Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of The United States

October Term 1999

R. R. AND BARBARA ANDERSON
Petitioner,

v.

FORD MOTOR COMPANY
Respondent.

Petition For A Writ Of Certiorari
To The United States
Court of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a district court order a new trial on the basis of a single juror's misconduct in the absence of evidence that the misconduct affected the verdict?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The full names of petitioners in this case are Ralph Raymond Anderson and Barbara Anderson.

The full name of respondent in this case is Ford Motor Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 186 F.3d 918 and is included in Appendix A (Apdx A) at 2-9. The opinion of the district court is unreported and is included in Appendix B (Apdx B) at 10-16.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on July 29, 1999, and denied the petition for rehearing on September 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PETITION FOR WRIT OF CERTIORARI

R.R. Anderson and Barbara Anderson respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

STATUTORY PROVISION INVOLVED

Federal Rule of Evidence 606 (Competency of Juror as Witness) provides at subsection (b) as follows:

> (b) **Inquiry into validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection

therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

STATEMENT OF THE CASE

1. Procedural History

Petitioners, a husband and wife, sued the Ford Motor Company in July, 1994, in United States District Court for the Western District of Missouri.

Jurisdiction in the district court was based on 28 U.S.C. § 1332. Petitioners alleged that their daughter's death was caused by the defective design of the seatbelt restraint system because it was not designed for persons of

small stature.

The case went to trial in May, 1997, and the jury awarded the Andersons $700,000 in compensatory damages. In October, 1997, the district court granted Ford's motion for a new trial, finding that Ford had been prejudiced by a juror's misconduct and that the opinions rendered by one of the Andersons' expert witnesses were unscientific and unreliable.

A second trial conducted in October, 1998, yielded a defense verdict.

Thereafter, the Andersons appealed the district court's October, 1997, decision granting a new trial to the Court of Appeals for the Eighth Circuit.

Jurisdiction of the circuit court was invoked pursuant to 28 U.S.C. § 1291. The circuit court affirmed the district court's decision on juror misconduct. Because of the affirmance on the juror misconduct question was dispositive of the appeal, the circuit court did not address the question concerning the expert's testimony and opinions.

2. Background

This case involves the process and standards by which allegations of juror misconduct are analyzed to determine whether prejudice has resulted and necessitates a new trial.

On August 29, 1992, the Andersons' daughter, Rise', was driving her 1991 Ford Probe when she was involved in a

single-vehicle collision. At the time of the accident, Rise' Anderson was the sole occupant in the automobile. Based on expert testimony from both sides, the speed at impact was approximately 15-20 miles per hour. The accident caused Rise' Anderson to suffer, inter alia, several broken ribs and a lacerated liver. On August 31, 1992, she died as a result of the lacerated liver.

The Andersons claimed that the Probe's seatbelt system was defectively designed because it failed to fit their daughter properly. Their primary contentions were (1) that the decedent's small physical size (approximately 5'1" tall, 105 pounds) required that she drive the car with the seat in a far-forward position in order to reach the controls; and (2) the 1991 Probe seatbelt system was designed so that as the seat is moved forward (to accommodate shorter drivers) the seatbelt geometry is altered and causes the torso belt webbing to cross over the soft abdominal tissues rather than over bony structures.

The Andersons offered expert testimony on the relationship between driver/occupant size and resulting seatbelt geometry as related to the 1991 Probe. The Andersons presented evidence that Rise' had worn the shoulder belt properly in the past. In sum, their case rested on the contention that given the relatively moderate crash forces from the 15-20 mph collision, Rise' Anderson would have survived if the seatbelt geometry had been proper for her size.

Ford maintained throughout the case that the 1991 Probe's seatbelt system was not defectively designed.

Ford argued that the pattern of Ms. Anderson's injuries indicated that, at the time of the accident, the shoulder belt was worn under her left arm. Placing the shoulder belt under the left arm can create improper belt geometry; however, this is considered misuse and would be a complete defense to the Andersons' claims.

Following seven days of trial proceedings, jury deliberations extended over the course of two days.

Ultimately, the jury returned a verdict for the Andersons and awarded $700,000 in compensatory damages.

Ford filed a post-trial motion arguing that it was entitled to a judgment notwithstanding the verdict or a new trial because juror misconduct had occurred. Ford also contended that one of the Andersons' experts had given testimony which was unscientific and unreliable.[1]

Ford's juror misconduct contention centered on juror Dan Willis. Mr. Willis was alleged to have conducted, during trial, an out-of-court seatbelt fit check using his 12 year old son as a subject. Ford also accused Mr. Willis of reporting the results of this fit check to his fellow jurors during deliberations.

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[1]The trial court agreed with both grounds for post-trial relief advanced by Ford. However, as noted *supra*, the Eighth Circuit decision addressed only the juror misconduct issue, which for purposes of appeal was dispositive.

The trial court convened a hearing on October 1, 1997, to address the juror misconduct issue. In the context of a hearing to challenge a jury verdict based upon misconduct, it is appropriate to consider evidence of the extent and timing of jury exposure to extraneous material. Fed.R.Evid. 606(b) generally precludes consideration of juror testimony regarding intra-jury communications. *U.S. v. Caldwell*, 83 F.3d 954, 956 (8th Cir. 1996). An exception to that general rule permits testimony regarding alleged external influences. *Id.* Once it has been established that external influences were introduced to the jury, the extent of the inquiry under Rule 606(b) is limited to matters such as duration of consideration by the jury, level of detail reached during the consideration, and whether it was reasonably likely to have affected the verdict. *U.S. v. Blumeyer*, 62 F.3d 1013, 1017 (8th Cir. 1995).

During the post-trial hearing, Ford called four jurors to testify.[2] The four jurors testified that during deliberations, Mr. Willis reported he had done a seatbelt fit check with his son in a 1991 Probe. Apdx C at 27-28, 40-42, 57-58, 63-64.

The jurors called by Ford also testified that Willis's disclosure was discussed for "a couple of minutes;" "five to

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[2]The four jurors called by Ford were Christina Erickson (presiding juror), Ronald Lemon, Vonia Smith and Debra Reinhardt.

ten minutes at the most;" or "a very short time." Apdx C at 33, 45, 58.

Juror Erickson testified that after Mr. Willis had disclosed the test, she asked him questions about it. She "didn't think it was particularly applicable" because Willis's son was not a good subject due to the difference in size between his son and the decedent, Rise' Anderson.[3] Apdx C at 29-32.

Neither juror Lemon nor juror Reinhardt asked Mr. Willis any questions about the test. Apdx C at 45, 67. Juror Smith could not recall when in the course of deliberations Willis made his disclosure. Apdx C at 58. Ms. Smith "did not get into any further discussion on what he did or how he did it or anything like that." Apdx C at 60. Ms. Erickson made no notes about Willis's statements. Apdx C at 37-38. Ms. Smith and Ms. Reinhardt testified that after the initial disclosure by Mr. Willis, the matter was not raised again during deliberations. Apdx C at 58-59, 68.

During the second day of deliberations Ms. Erickson and Mr. Lemon discussed, outside the presence of other jurors, whether the Willis disclosure, made the prior day, should be brought to the trial court's attention. In that regard, Mr. Lemon testified that he "didn't think it was really worth the trouble." Apdx C at 45-46.

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[3]The uncontradicted testimony was that Mr. Willis's son was, at that time, approximately 4'8" tall, and weighed approximately 86 pounds.

Ms. Reinhardt testified about a conversation concerning the Willis disclosure involving herself, Ms. Erickson and Mr. Lemon. Ms. Reinhardt stated that Ms. Erickson said that Willis "should have excused himself from the jury for saying that [about the test]" and that Mr. Lemon speculated about Mr. Willis's reason for doing the test. Ms. Reinhardt testified that she did not know whether Willis's test ". . . was doing a history on a case or not." Apdx C at 67.

Mr. Willis was called by plaintiffs during the post-trial hearing. He specifically denied doing the fit check and testified he had reported to his fellow jurors that he would have liked to do such a test. He testified that subsequent to his statement about his wish to do the test, the matter did not come up again during the course of deliberations. Apdx C at 73. Mr. Willis acknowledged that he was aware such a test was contrary to the court's instructions. Apdx C at 80. Mr. Willis also testified he had no recollection of being asked any questions by other jurors about the fit check. Apdx C at 80.

At the conclusion of the evidentiary phase of the post-trial hearing, the trial court found that juror Willis had performed the fit check contrary to the court's instructions. Apdx C at 88-89.

During oral argument, at the conclusion of the post-trial hearing, the following colloquy took place:

The Court: Well, see, my real concern is how

it impacts on Mr. Willis's participation in the verdict. I don't know that I feel that the other jurors were necessarily prejudiced by Mr. Willis's statement that he had performed this fit check, but it seems to me that he probably was. He probably was prejudiced by virtue of the fact that he performed this fit check and that he determined that the seatbelts did not fit, properly fit a person's small stature based upon his out-of-court experiment in that regard. And he was one of the jurors that voted unanimously on the verdict. You understand what --

Mr. Eye: I understand that we're focusing on him.

The Court: Not worried about the other jurors but we're focusing on Mr. Willis, that we have someone who went out and did this test and made a determination based upon information that he had gathered extraneous to the trial proceeding.

Mr. Eye: But the leap there is that it actually did prejudice the verdict that he rendered, and there is no indication that that happened.

> The Court: Well, yeah, I guess that's a judgment that I have to determine, you know, whether it's reasonable to determine that did prejudice him. Apdx C at 88-89.

The trial court later issued its written order granting a new trial and stated that the out-of-court test . . . was a significant matter considered by juror [Willis] in his joining the verdict in the case at bar. Because juror Willis based his judgment on an out-of-court experiment in regard to a crucial issue, with knowledge that said experiment was contrary to the instructions of the court and improper, and further considering that juror Willis was not truthful with the court in regard to the out-of-court experiment that he conducted, the court believes that juror Willis was prejudiced against the defendant. Apdx B at 11-13.

In anticipation of the retrial of the case, a pretrial hearing was conducted on September 11, 1998. During the course of the pretrial hearing, the trial court inquired of counsel about the status of settlement negotiations. After hearing that the parties were far apart, and that Ford's offer was $50,000, the court made the following observations:

> I mean, obviously, Ford has got some exposure in this case and we saw that last time. **And quite frankly, I think that without the juror going out and doing the**

seatbelt test, that jury was inclined to find in plaintiffs' favor and that can happen again.

Apdx D at 101 (emphasis added).

The retrial resulted in a defendant's verdict. Plaintiffs then appealed to the Eighth Circuit the trial court's order granting the new trial. The Eighth Circuit acknowledged that a jury's exposure to extraneous materials requires a new trial only if such are prejudicial to the unsuccessful party. Apdx A at 7-8, 186 F.3d at 920. However, the Eighth Circuit opinion did not consider whether the extraneous information actually affected the verdict.

Instead, the Eighth Circuit opinion adopted the rule announced in *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992), and found that the trial court's conclusions supported the determination that there was **"a reasonable possibility** that the communication altered [the jury's] verdict." *Id.* (emphasis added).

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Prior to the instant case, the question of whether in a civil case, juror exposure to materials not admitted in

evidence required a new trial was controlled in the Eighth Circuit by *Peterson v. General Motors Corp.*, 904 F.2d 436, 440 (8th Cir. 1990) and *Banghart v. Origoverken*, A.B., 49 F.3d 1302, 1306 (8th Cir. 1995). These cases held that exposure to extraneous materials mandated a new trial only upon a showing that the materials prejudiced the unsuccessful party. *Id.*

The Eighth Circuit's opinion in the instant case acknowledged the *Banghart* standard but then relied upon *Artis*, *supra*, and concluded that Mr. Willis's test and report thereof created "a reasonable possibility that the communication altered [the jury's] verdict." ApdxA at 7-9, 186 F.3d at 921. This is not the standard announced in *U.S. v. Olano*, 507 U.S. 725, 739, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). *Olano* requires the lower courts to consider whether the extrinsic information affected the jury's verdict, not whether "a reasonable possibility" exists that it did so. The *Olano* standard was not considered by the lower courts in any way; rather a more lenient "reasonable possibility" test pursuant to *Artis* was applied. This is, therefore, a deviation from the *Olano* standard.

The Eighth Circuit departed from the *Olano* standard by permitting an inference of prejudice rather than direct evidence thereof. The record in this case is devoid of evidence of prejudicial impact stemming from Mr. Willis's test. Except in rare exceptions, *Olano* does not permit a presumption of prejudice. 507 U.S. at 737, 738. Even in

those instances when prejudice is presumed *(e.g. Remmer v. U.S.*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)),the "ultimate inquiry is the same", to wit: did the extraneous information affect the deliberations and verdict? 507 U.S. at 739. Likewise, in *O'Neal v. McAnich*, 513 U.S. 432, 435, 437, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), the court addressed the question whether possible jury confusion concerning an instruction created "substantial and injurious effect or influence in determining the jury's verdict. . ." *Id.* at 436. This Court stated that the inquiry of the judge in such an instance should be "do I, the Judge, think that the error substantially influenced the jury's decision?" *Id.* How could the trial judge herein answer this question in the affirmative, and at the same time believe that the jury was "inclined to find in plaintiff's favor"?

The Eighth Circuit opinion stated that Mr. Willis's test, done in violation of the court's instruction not to do an independent investigation, was alone sufficient to constitute evidence of prejudice. Apdx A at 8-9, 186 F.3d at 921. A finding that the out-of-court test was done does not end the inquiry. There must also be a determination whether the violation affected the verdict. *Olano*, 507 U.S. at 739. Had the lower courts completed the *Olano* analysis, the jury's verdict would have been left intact because there was no evidence that the out-of-court test affected the verdict.

Moreover, the determination that juror Willis performed the fit check does not justify an assumption that he

was thereby prejudiced. The case was about the seatbelt fit on Rise' Anderson, or other 5th percentile persons. All the testimony focused on the belt geometry as it impacted on women 5' to 5'2" in height. The jury knew prior to deliberations that a 4'8" individual would fall below the 5th percentile of the population. The fit check, if performed by Willis, might have indicated that the belt did not properly fit his son, but would offer no information as to the fit on Rise' Anderson. Indeed, this was the observation of presiding juror Erickson concerning the out-of-court test.

Assuming *arguendo*, Willis's prejudice, still begs the question whether it significantly influenced the verdict. Petitioners contend there is no evidence of an affect on the verdict. The record here is totally devoid of evidence that juror Willis attempted to sway the opinions of the others based on his fit test; that he held out for a higher verdict against all or a majority of the other jurors; that he persuaded any or all of the others to decide in favor of plaintiffs after initial ballots in favor of defendant; that he initially wanted a verdict in favor of defendants and changed his position subsequent to the fit check; or any other objective evidence that the fit check played a role in deliberations. These objective factors could be considered under Fed.R.Evid. 606(b).

The holding of the Eighth Circuit in this case is a departure from its own precedent as announced in *Peterson* and *Banghart*, which require not the possibility of prejudice

but, rather, a showing that the materials are actually prejudicial. This is also the standard in other circuits. *See e.g. Wilson v. Vermont Castings, Inc.*, 170 F.3d 391, 394 (3rd Cir. 1999) and *Konkel v. Bob Evans Farms, Inc.*, 165 F.3d 275, 282 (4th Cir. 1999). If, as the lower courts apparently found in this case, misconduct by a juror categorizes that juror as prejudiced without demonstration of actual bias, then no jury verdict could survive after evidence of some violation of instructions by one or more jurors.

CONCLUSION

The lower courts' departure from this Court's precedents and its conflict with authority from other circuits makes consideration by this court essential.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-4102WMKC

R.R. Anderson, etc., et al.,	*
Appellants,	* Appeal from the United
	* States District Court
v.	* for the Western District
	* of Missouri
Ford Motor Company,	*
Appellee.	*

The petition for rehearing filed by the appellant has been considered by the court and is denied.
(5193-010199)

September 3, 1999

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-4102WM

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	*	
	*	
R.R. and Barbara Anderson,	*	
	*	
Appellants,	*	On Appeal from the United
	*	States District Court
v.	*	for the Western District
	*	of Missouri
Ford Motor Company,	*	
	*	
Appellee.	*	
	*	
	*	

Submitted: June 16, 1999
Filed: July 29, 1999

Before BOWMAN and HEANEY, Circuit Judges, and

LONGSTAFF,* District Judge.

RONALD E. LONGSTAFF, District Judge.

R.R. and Barbara Anderson ("the Andersons") filed this diversity action against Ford Motor Company ("Ford"), alleging that a faulty restraint system in a 1991 Ford Probe caused their daughter's fatal injuries. The case went to trial in May 1997, and the jury awarded plaintiffs $700,000 in compensatory damages. In October 1997, the district court [1] granted Ford's motion for new trial, finding that Ford had been prejudiced by juror misconduct, and that the opinions rendered by one of plaintiffs' expert witnesses were unscientific and unreliable.

A second trial held in October 1998 resulted in a defense verdict. Plaintiffs now appeal the district court's October 1997 order for a new trial.[2] We affirm.

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*The Honorable Ronald E. Longstaff, United States District Judge for the Southern District of Iowa,sitting by designation.

[1]The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri

[2]The Andersons did not appeal the verdict in the second trial.

I.

On August 29, 1992, the Andersons' daughter, Rise', was driving her 1991 Ford Probe when she was involved in a single vehicle collision. As a result of the accident, Ms. Anderson fractured the seventh and eighth ribs on her right side, the eighth rib on her left side, and suffered a transectional cut across her liver. She died from her injuries within two days of the accident.

Her parents claim their daughters' death was caused by a faulty restraint system not designed for persons of small stature. Due to Ms. Anderson's height, (approximately 5' 2"), she drove with the seat in a nearly full-forward position. The Andersons contend that as the seat was moved forward, the design of the belt system caused the torso belt webbing to cross over soft abdominal tissues, rather than over bony structures. According to the Andersons, this improper positioning caused crash forces to focus on the abdominal area, thereby injuring Ms. Anderson's ribs, liver and spleen. Ford disputes this theory, however, arguing that Ms. Anderson's injuries occurred because she misused her shoulder belt by placing the shoulder belt under her left arm.

During the first trial, Peter Bertelson, plaintiffs' expert, testified about the design relationship between occupant size and restraint system effectiveness. Dr. Bertelson testified that the restraint system was not properly designed for small individuals due to the alleged asymmetry

of the lap belt restraints. According to Dr. Bertelson, the asymmetry was caused by the fact that one of the lap belt anchors was attached to the floor and one was attached to the seat.

On cross-examination, Dr. Bertelson admitted that he did not know where the anchors for the lap belt of the 1991 Probe were located. He further admitted he did not know whether the inboard anchor moved when the seat moved forward along the seat track.[3]

Following return of the jury's verdict and entry of judgment, Ford obtained evidence that a juror, Dan Willis, had conducted an improper out-of-court test on the 1991 Ford Probe's seat belt system. Ford moved for judgment notwithstanding the verdict or for a new trial on the grounds of juror misconduct and on the grounds that Dr. Bertelson's opinions regarding the asymmetry of the lap belt anchors were unreliable and unscientific.

The district court conducted a hearing to evaluate the alleged juror misconduct. During this hearing, five jurors, including Mr. Willis, testified regarding their knowledge of Mr. Willis' alleged tests. Four jurors testified that Mr. Willis told them during deliberations that he had visited a Ford dealership to conduct a fit test of a 1991 Probe's restraint

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[3]The Andersons contend that on cross-examination, counsel for Ford confused the seat *belt* anchorage points with the point at which the seat *track* is attached to the floorboard.

system. Mr. Willis allegedly used his son, who was 4' 8" at the time, to conduct the test.

Two jurors testified Mr. Willis told them the restraint system did not fit his son, and that Mr. Willis admitted he knew the test was against the court's instructions. Mr. Willis testified he did not actually conduct the test, but simply told the other jurors he would *like to do so.*

The district court granted Ford's motion for new trial on both grounds raised by Ford. With regard to the alleged juror misconduct, the court found that Mr. Willis had in fact conducted the test, that his misconduct involved a controlling issue in the case, and that Mr. Willis used the test to form his opinion on the controlling issue. The court further found the experiment wascontrary to the court's instructions,[4] and that Mr. Willis was not truthful with the court. Accordingly, the district court determined Mr. Willis' conduct had prejudiced Ford.

With regard to the expert witness testimony, the district court found that Dr. Bertelson rendered an opinion that the restraint system was defective due to asymmetry and admitted he did not know where the anchors were placed on the 1991 Ford Probe or whether the anchors actually moved

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[4]In Instruction No. 6, the Court cautioned the jurors that they should "not do any research or make any investigation about the case on [their] own."

with the seat when it was adjusted. The court therefore concluded Dr. Bertelson was without sufficient knowledge to render such an opinion, and that his opinion was unscientific, unreliable, and prejudicial to Ford.

II.

We will first address the district court's treatment of the alleged juror misconduct. This Court reviews a district court's grant or denial of a motion for new trial for abuse of discretion. *Lockley v. Deere & Co.*, 933 F.2d 1378, 1385 (8th Cir. 1991).

"In a civil case, the exposure of jurors to materials not admitted into evidence mandates a new trial only upon a showing that the materials are prejudicial to the unsuccessful party." *Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 (8th Cir. 1995). The Andersons' primary argument on appeal is that there was no *proof* of prejudice resulting from the alleged extraneous material; rather, the court *inferred* defendant was prejudiced. We disagree.

Federal Rule of Evidence 606(b) provides that a juror may testify as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Fed. R. Evid. 606(b). During the inquiry, "[j]urors should not be asked whether their deliberations were prejudiced by extraneous information or outside influences,

[however]." *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992). The district judge must use the testimony to decide "whether there is a reasonable possibility that the communication altered [the jury's] verdict." *Id.* (internal citations omitted).

In the present case, the district court properly took testimony from several jurors solely on the issue of whether Mr.Willis' test was brought to the attention of other jurors. *Id.* Four jurors testified Mr. Willis told them during deliberations he had conducted a fit test of the 1991 Probe restraint system on his son. As noted by the court in *Kilgore v. Greyhound Corp.*, 30 F.R.D. 385, 389 (E.D. Tenn. 1962), the other jurors "would have been naive indeed to have accepted as 'expert testimony' [Mr. Willis'] conclusions from his experiences out of court."

Nevertheless, in the present case, the district court did not base its order for a new trial ons whether *other* jurors inappropriately considered Mr. Willis' test results. Rather, the district court found *Mr. Willis himself* was biased in his consideration of the issues, which therefore resulted in prejudice to Ford. Specifically, the district court found Mr. Willis "based his judgment on an out-of-court experiment in regard to a crucial issue, with the knowledge that said experiment was contrary to the instructions of the Court and improper, and further . . . that juror Willis was not truthful with the Court in regard to the out-of-court experiment that he conducted." (October 4,1997 Order Granting Ford's Motion

for New Trial, at 3-4). In short, the district court found the fact Mr. Willis conducted the test in violation of the court's directive constituted evidence of prejudice.

The above conclusions were properly within the province of the district court, and support a conclusion that there was "a reasonable possibility that the communication altered [the jury's] verdict." *Artis*, 967 F.2d at 1142. Accordingly, the district court did not abuse its discretion in ordering a new trial based on Mr. Willis' alleged misconduct. Because the Andersons appealed only the order for new trial, and because juror misconduct is a sufficient, independent reason for granting a new trial, we need not address whether the district court abused its discretion in excluding Dr. Bertelson's testimony.[5]

The decision of the district court is AFFIRMED.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[5] The Court also declines to rule on Ford's motion to strike portions of the record on appeal, as the district court's statements in September 1998 were irrelevant to his October 1997 conclusion that one particular juror was prejudiced against Ford.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRCIT OF MISSOURI
WESTERN DIVISION

File Stamped
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OCT 23 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

R. R. ANDERSON and	)
BARBARA ANDERSON,	)
Heirs-at-Law of Decedent,	)
Rise' R. Anderson,	)
	)
Plaintiffs,	)
vs.	)**Case No. 95-0750 CV-W-4**
	)
FORD MOTOR	)
COMPANY,	)
Defendant.	)

ORDER

On the 1st day of October, 1997, plaintiffs appeared herein by and through their counsel Pedro L. Irigonegaray, Robert Eye, Elizabeth Herbert and Fred Slough. Defendant appeared by and through its counsel Robert T. Adams and Shana J. Long. Evidence was heard on defendant Ford Motor Company's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial.

Upon hearing the evidence of the parties it was determined by the Court that during the course of jury deliberations herein juror Dan Willis advised the jury that he had taken his son, who is 4 feet 8 inches tall and weighs 86 pounds, to a Ford dealership and conducted a fit check test in regard to the seat belts for a Ford Probe automobile. Juror Willis further advised the jury that his fit check test revealed that the seat belt did not fit his son. Juror Willis admitted to the other jurors that he realized that he should not have conducted this out-of-court experiment and that he was aware that his conduct was in violation of the Court's instructions. The parties were provided opportunity to file supplemental briefs in regard to issues addressed at said hearing.

Now on this 21st day of October, 1997, the Court being fully advised herein takes up for disposition defendant Ford Motor Company's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial (Document # 160) and plaintiffs' Motion for New Trial (Document #162).

DEFENDANT'S MOTION FOR NEW TRIAL

Ford alleges seven points of error in its motion.

1. Ford is entitled to a new trial because the jury was exposed to extraneous prejudicial information in the form of an out-of-court test conducted by juror Dan Willis on the most critical issue in the case.

2. The trial court erred in denying Ford's Motion for Judgment and submitting the case to the jury because plaintiffs failed to prove any defect in the restraint system of the vehicle resulted in any injury to plaintiffs.

3. The trial court erred in admitting plaintiffs' Exhibits Nos. 101 and 102, blow-ups of pages from a document entitled Restraint System Manual.

4. The trial court erred in allowing plaintiffs' expert Peter Bertelson to testify in that his opinions were unscientific and unreliable.

5. The trial court erred in admitting plaintiffs' Exhibit No. 1, the police accident report, over Ford's objections that Exhibit No. 1 constituted inadmissible hearsay.

6. The verdict rendered by the jury was excessive and against the weight of the evidence in that plaintiffs only established $46,000 in actual damages and had no damages for loss of future support.

7. The cumulative prejudicial effect of the before mentioned errors requires a new trial.

Ford's motion is sustained on the basis that the jury was exposed to the extraneous prejudicial information in the form of an out-of-court test conducted by juror Dan Willis and on the basis that plaintiffs' expert Peter Bertelson's opinions were unscientific and unreliable.

JUROR'S OUT-OF-COURT TEST

In a civil case the exposure of jurors to extraneous material not admitted into evidence mandates a new trial when it is established that the materials are prejudicial to the unsuccessful party. ***Banghart v. Origoverken, A.B.*, 49 F.3d 1302,1306 (8th Cir. 1995).** Fed.R.Evid. 606 (b) provides in pertinent part that: ". . .a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The questioning of jurors in regard to extraneous information is limited to whether in fact a communication was made. ***Artis v.Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992).** Thereafter, the judge determines "whether there is a reasonable possibility that the communication altered [the jury's] verdict." ***Id.***

In the case at bar a controlling issue to be determined by the jury was whether the seat belt restraint system of the 1991 Ford Probe in question was designed to properly and safely fit a small person so that a small person would be adequately protected in the event of a collision. In the opinion of the Court, the out-of-court experiment conducted by juror Dan Willis was a significant matter considered by said juror in his joining in the verdict in the case at bar. Because juror Willis based his judgment on an out-of-court experiment in regard to a crucial issue, with the knowledge that said experiment was contrary to the instructions of the Court and improper, and further

considering that juror Willis was not truthful with the Court in regard to the out-of-court experiment that he conducted, the Court believes that juror Willis was prejudiced against defendant.

BERTELSON OPINION

Peter Bertelson, who holds a doctorate degree in mechanical engineering, was called as an expert witness on behalf of the plaintiffs. Dr. Bertelson testified to his extensive credentials including having been a professor of engineering at the university level, teaching safety courses to designers and engineers at defendant Ford Motor Company, heading a department at Ford Motor Company in regard to certification of compliance with federal motor vehicle safety standards and heading a department at Ford Motor Company to assure occupant protection in Ford vehicles.

On direct examination at trial, Dr. Bertelson testified that the restraint system of the 1991 Ford Probe was not properly designed for small individuals due to the alleged asymmetry of the lap belt restraints. Dr. Bertelson testified on direct examination that the asymmetry was caused by the fact that, according to Bertelson, one of the Probe's lap belt anchors was attached to the floor and one was attached to the seat. Then on cross-examination, Dr. Bertelson admitted that he did not know where the anchors were placed on the 1991 Ford Probe or whether the anchors actually moved with the seat when it was adjusted.

Bertelson rendered an opinion that the restraint system of the vehicle in question was asymmetrical and, therefore, defective, admittedly without sufficient knowledge of the restraint system at issue to render such an opinion. Dr. Bertelson's opinion was unscientific, unreliable, and prejudicial to defendant.

Under the Federal Rules of Evidence, a federal trial judge must insure that any and all scientific testimony or evidence admitted is not only relevant but reliable. ***Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L.Ed. 469, 480 (1993)**. As recognized by the United States Supreme Court in ***Daubert***, "[E]xpert evidence can be both powerful and misleading because of the difficulty in evaluating it." ***Id.* at 484.**

The expression of an expert opinion by Dr. Bertelson admittedly without the requisite knowledge upon which to base said opinion was prejudicial to defendant. Furthermore, because of his willingness to render an opinion without sufficient knowledge upon which to base his opinion, Dr. Bertelson will not be allowed to testify as an expert on retrial of this cause.

PLAINTIFFS' MOTION FOR NEW TRIAL

Plaintiffs' Motion for New Trial (Document # 162) challenges the Court's failure to submit punitive damages. In order to establish a submissible claim for punitive or aggravating circumstances damages, plaintiffs were required to prove, by "clear and convincing" evidence: (1)

Ford placed an unreasonably dangerous product in the stream of commerce with knowledge of its defective condition; (2) Ford showed complete indifference to or utter disregard for the safety of others; and (3) Ford acted with some degree of wantonness or bad motive. ***Drabik v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *Angotti v. Celotex Corp.*, 812 S.W.2d 742, 746 (Mo. App. 1991); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. banc 1996)**. The evidence produced at trial did not support any of the necessary elements of a submissible punitive or aggravating circumstances damages claim.

WHEREFORE, plaintiffs' Motion for New Trial (Document # 162) is DENIED and defendant's Motion for New Trial (Document # 160) is GRANTED.

/s/ Gary A. Fenner
GARY A. FENNER, JUDGE
UNITED STATES DISTRICT COURT

DATED: /s/ 10-4-97

APPENDIX C

TRANSCRIPT OF PROCEEDINGS
HEARING ON MOTION FOR NEW TRIAL

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

R. R. & BARBARA ANDERSON	)
heirs-at-law of Rise R.	)
Anderson, Decedent,	)
Plaintiffs,	)
v.	)No.95-0750-CV-W-4
FORD MOTOR COMPANY,	)October 1, 1997
Defendant.	)Kansas City,
	)Missouri
	)CIVIL

TRANSCRIPT OF PROCEEDINGS
(Hearing on Motion for New Trial)
BEFORE THE HONORABLE GARY A. FENNER
UNITED STATES DISTRICT JUDGE

Proceedings recorded by electronic stenography
Transcript produced by computer

APPEARANCES

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THE COURT: Ready on your motion, Mr. Adams?

MR. ADAMS: Yes, Your Honor.

THE COURT: Ready, Mr. Irigonegaray?

MR. IRIGONEGARAY: Mr. Eye is going to handle it.

THE COURT: I got your name down.

MR. IRIGONEGARAY: Yes, you've got the name right.

THE COURT: All right. There really are two matters that I would particularly like to hear from counsel on in regard to the Motion for New Trial.

One is the alleged juror misconduct, and I expect that there will be some evidence presented on that. Before we get into that matter, I would say that it is my opinion that pursuant to Federal Rule of Evidence 606(b) that the thought processes of the jurors and the impact of any extraneous information that was brought to their attention is not a proper subject matter of inquiry. I believe that the inquiry should be limited to what extraneous information, if any, was brought to the attention of the jury, and the prejudice or potential prejudice of that would then be for to determine, and is would certainly want to hear from counsel in regard to your position on whatever evidence we might hear.

The other matter that is would like to hear from counsel on, and I realize that this is short notice to you on this matter, but that is the testimony of Dr. Bertelson and

whether or not Dr. Bertelson's opinions were scientifically reliable. It was my recollection from the trial that Dr. Bertelson was somewhat, if not directly, contradictory in regard to the opinions he rendered on the symmetry and the effect of symmetry from an engineering and design standpoint in this particular vehicle.

I did receive from the court reporter a rough draft of Dr. Bertelson's testimony. And Dr. Bertelson testified on direct examination -- and I would be happy to share this with counsel if any of you haven't had an opportunity to review this testimony and give you an opportunity to address this concern that I have in regard to Dr. Bertelson's testimony and to consult among yourselves if you wish to have an opportunity to do that before you respond.

At any rate, Dr. Bertelson testified on direct examination that when one seat lap belt is anchored to the moving seat like the Probe, that renders the seat belt design asymmetrical and, therefore, defective. Dr. Bertelson testified that the seat belt anchorage should be symmetrical and that it was his opinion that it was not in the Probe automobile.

And then on cross-examination, Dr. Bertelson admitted that he did not know how the seat belts were anchored in this particular vehicle, that he had not examined the vehicle, and he didn't know whether the seat belt was anchored to the seat or anchored to the floor. Dr. Bertelson admitted that if it was anchored to the floor that moving the seat from the rear to the forward position, or regardless of what position it was in, that would not affect the symmetry

of the belt.

It seems to me that Dr. Bertelson in direct examination was expressing an expert opinion on the matter that he was, by his own admission, not competent to render an opinion on, and I'm concerned about that, and I'd like to hear from counsel as to your position on it. And I'm not asking you to do it right now. I'm just telling you so that as we proceed you'll have an opportunity to think about that, you can have an opportunity to talk about it, and we can discuss it among ourselves.

MR. IRIGONEGARAY: Not having the record makes it difficult for us.

THE COURT: This is a rough draft, it's not an
official copy of the transcript, and the sections I have referred to, I have orange markers on it, and the two sections where Dr. Bertelson referred to symmetry are on Pages 18 and 19 of the rough draft of the transcript. And we can mark this, if you would like, so that it becomes a part of this record to reflect what I'm referring to. Dr. Bertelson's opinions that I referenced on cross-examination are on Pages 53, 54, and 55 of the rough draft of the transcript.

MR. IRIGONEGARAY: Judge, I wouldn't want to just limit the marking of pages to those five because I truly believe that the totality of Dr. Bertelson's testimony clears up these issues that you're referring to. And I would not want to have to defend Dr. Bertelson's testimony

merely on those five pages.

THE COURT: Okay. I appreciate that. And I understand that you are likely to have a position that this doesn't have a significant impact on the testimony. I just wanted -- you know, I just wanted to be up front with you and tell you that's an item of concern that I have, and I'd like to hear from you on it. Could you mark this as an exhibit for me, please, Tracy?

MR. IRIGONEGARAY: And may we, Your Honor, if it is an issue of concern to you, be given an opportunity to have us remove or obtain a rough copy like this one, take it with us, and possibly with time to read and think this through, provide the court with a written memorandum as to how we view this?

THE COURT: Yes, I would provide you an opportunity to do that.

MR. IRIGONEGARAY: May we, then, set this particular issue aside today and have a time and place set so that we are afforded an opportunity to address this issue for the court?

THE COURT: I don't see any problem with that. Mr. Adams, would it be agreeable with you to submit briefs on the question of the significance of Dr. Bertelson's testimony?

MR. ADAMS: It would be, Judge. I'm prepared to talk about it today just to address some of your concerns.

THE COURT: I'd like -- if any of you have anything you'd like to say about it today, I'd like to hear

from you on that. But the mere fact that we take it up and discuss it today, I will provide counsel an opportunity to brief that subject, assuming that at the conclusion of today's hearing that remains to be an issue that I have some concern about.

MR. ADAMS: Judge, what I have to say is, you know, very brief, and we could probably cover it right now if you want to, even without me reviewing the testimony, because I recall what he said.

THE COURT: Let's give them an opportunity to think about it and look at the transcript that I have here. And why don't we proceed with the issue of alleged juror misconduct, and then we can get back to Dr. Bertelson at the conclusion of that.

MR. IRIGONEGARAY: For the record, I acknowledge receipt of the rough transcript, and I appreciate the court's giving us the opportunity.

THE COURT: All right. Thank you. All right, Mr. Adams, are you prepared to proceed now?

MR. ADAMS: Yes, Your Honor. And, Your Honor, pursuant to the court's order, it's my understanding that what we're going to talk about is just the limited issue as to the exposure of the jurors to the extraneous information. And I have four jurors that I've subpoenaed here to testify, and with the court's permission, I would have them come in and testify. And then I think after all of the witnesses are presented, the lawyers can sum up the gist of the testimony in the arguments.

THE COURT: All right.

MR. ADAMS: Your Honor, the first witness is Christina Erickson, who was a juror.

THE COURT: All right. Miss Erickson, please come up and be sworn by the clerk.

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CHRISTINA ERICKSON, being first duly sworn by the Courtroom Deputy, testified as follows:

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DIRECT EXAMINATION

By Mr. Adams:

Q. Good morning, Miss Erickson. My name is Robert Adams. I represent Ford Motor Company, and I believe you know me. Would you please state your name for the record, please?

A. Christine Erickson.

Q. Would you please tell the judge a little bit about your

educational background?

A. I have an undergraduate degree in computer science and a masters in business administration and a certificate in project management.

Q. Would you please describe to the judge your employment background?

A. I've worked for Kansas City Power and Light for 22 year in various aspects of project management, systems applications, our CI system, disaster recovery, strategic

planning, and I'm currently working on transition process.

Q. Ma'am, you were a juror in the case entitled Anderson v. Ford, correct?

A. Yes.

Q. During your deliberations, did a juror state that he actually conducted an out-of-court test on a restraint system on a car similar to-the Probe at issue in the lawsuit?

A. Yes.

Q. Who was that juror?

A. Dan, I think his last name was Dan Willis.

Q. Would you please describe in as much detail as possible exactly what was said by Mr. Willis on that issue?

A. He made a comment to the group when we were discussing the case that -- I forget how it came up to begin with, but he was talking about that he had gone out with, taken his son to look at cars and was real curious to see how this, how it fit, that he took his boy and put him in a Probe and checked to see how the seat belt fit, that it didn't fit. But that he didn't tell his son why they were going to look at cars.

Q. And is there any doubt in your mind that Mr. Willis stated that he actually did the test as opposed to saying that he merely would like to do such a test?

A. No. In fact, the first thing he said was something about, "I know they said we shouldn't," but he did go out and look at cars.

Q. Did Mr. Willis acknowledge that what he did was against the court's instructions but he was curious to see what the result of the test would be?

A. Yeah. He made the comment he wasn't -- he knew they told you not to, but.

Q. And when Mr. Willis made the statements about the test that he performed, did you ask him certain questions about that test?

A. Yes.

Q. What questions did you ask him?

A. He had been talking quite a bit about his son just in other breaks and that -- and I recall that I thought he was still fairly young, preteen type thing, so it struck me as odd that, first off, that he would do it and why would he take his son because I didn't think it would have much bearing on the size and weight of what Miss Anderson was. So I just asked him, how tall was your son, how much did he weigh, because I didn't think it was particularly applicable, besides the fact that he did it in the first place. I just didn't think it was a good subject to test with.

Q. And in response to your questions about this test, did Mr. Willis, in fact, state that his son was approximately four feet tall, eight inches, and weighed approximately 86 pounds? A. Yeah.

Q. Would you have asked Mr. Willis any questions about the test if he would have said, "I would like to do such a test"?

A. No.

MR. EYE: Objection, speculation.

THE COURT: Overruled.

Q. And I believe you indicated that Mr. Willis did not tell his son why he was looking at the cars, correct?

A. Right. I kind of looked at that as his own rationalization why he thought this was okay because he didn't tell his son. He didn't go out and talk about the trial or anything, he didn't tell his son what he was looking for.

Q. All right. Ma'am, you've executed an affidavit in this case, correct?

A. Uh-huh.

Q. And I'm going to show you what has been marked as Defendant's Exhibit No. 1. Is that the affidavit that you executed?

A. Uh-huh.

Q. You've got to answer yes or no.

A. Yes.

Q. All right.

MR. ADAMS: And, Your Honor, I would ask that this affidavit be made part of the record, which I believe it is already attached to the briefs.

THE COURT: All right. Any objection?

MR. EYE: I'm going to object for the record because he's already elicited testimony that's far superior to the affidavit. If he wants to rely on the affidavit, I suppose he can. But for the record, we object.

THE COURT: Okay. Defendant's Exhibit 1 is received. Objection is overruled.

(Defendant's Exhibit 1 was admitted into evidence.)

MR. ADAMS: Those are all the questions I have at this time.

THE COURT: Thank you. Mr. Eye.

MR. EYE: Thank you, Your Honor.

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CROSS-EXAMINATION

By Mr. Eye:

Q. Miss Erickson, when was it that Mr. Willis allegedly made these statements about an out-of-court fit check?

A. It was during our deliberation.

Q. Now, my memory is deliberations extended over about a day and a half?

A. Uh-huh.

Q. Give or take a couple of hours?

A. Almost two days, uh-huh.

Q. Do you remember which day and approximately the time that this was done?

A. No.

Q. Do you recall whether any other jurors made responses to his alleged statements about an out-of-court fit check?

A. Responses in what --

Q. Did any other jurors make any response to his alleged statements in this regard?

A. I think that one or two of them asked him another question about, well, did it fit, or something.

Q. Now, if I understand your testimony, you saw this as being something that didn't have, at least in your own mind, a great deal of importance because it was bearing on the

height and weight of somebody who wasn't the size of Rise Anderson; isn't that correct?

MR. ADAMS: Objection, Your Honor, we're getting into the exact area that you told us before we were not supposed to get into.

THE COURT: It came out on direct examination, and I'll let him inquire briefly, but I don't believe that it's relevant or appropriate to go into the thought processes of the jurors. But since it came out on direct, I'll allow you to.

MR. EYE: Your Honor, I had no intention of doing so until I heard the response on direct.

A. I'm sorry. Could you repeat your question?

Q. (By Mr. Eye:) As I understood your testimony, it was your contention that a fit check on a four foot, eight inch size person didn't have much bearing on the issues in this case because we were dealing with a fit check or how the seat belt fit on somebody the size of Rise Anderson.

MR. ADAMS: Same objection as before, Judge, and also, he mischaracterized her testimony.

THE COURT: Overruled.

Q. You may answer.

A. I personally thought that it was not a real good thing to do, that, no, this person wasn't the right size and shape. But it kind of concerned me to bring that out, that it wasn't the right size and shape so that it didn't mislead some of the other people that might be in the room. And it apparently was important to him if he, first off, did it, and then, secondly, felt compelled to come tell the group about it.

Q. What exactly did you say in response?

A. I asked him -- I kind of -- before he went on and elaborated a whole lot, I went on and said, "Wait a minute, how tall is your son and how much does he weigh," just to kind of ask him those questions. And I remember somebody else saying, well, you know, about fit. I can't tell you how it might have affected the other jurors, per se. I know how it affected me. It obviously was important to him.

Q. How long did the discussion last concerning the alleged fit check that Mr. Willis conducted outside of the courtroom?

A. Probably a couple of minutes.

Q. Was it brought up subsequent to that time during the deliberative process that the jury was undergoing?

A. I don't recall it being talked -- I mean, we didn't talk about it at great lengths about the fact that he had done it.

Q. Miss Erickson, when were you contacted by anybody from the defendant's lawyers?

A. It was the first day that we were back at work. That was a holiday weekend, so I think it was the Tuesday.

Q. Who contacted you?

A. I think Mr. Adams did.

Q. What did he say and what did you say?

A. He wanted to know whether I would be willing to discuss the case, anything about, you know, why they lost or what about it, if I would be willing to discuss it with him.

Q. And what was your answer?

A. I said, sure.

Q. And then what did he ask?

A. He just, he and one of his associates met with me the next day.

Q. Where?

A. At my office. And they just wanted me to talk about -- I still had my notes from it. He was interested in why they lost or why, you know, what some of the key points were. So I kind of recreated for him a chart that we kind of used in the jury room, about how we had gone through the decision process and just discussed the case in general.

Q. Who raised the issue of Mr. Willis's out-of-court, the alleged out-of-court fit check?

A. I'm sure I mentioned it. There were several things that had come up that I thought of just as we were discussing it. Kind of an odd -- it's the first time I had been through a jury. There were some things I thought were peculiar I had questions about. It seemed to me that there had to be some key piece of evidence for whatever reason we didn't have access to. I was just curious.

Q. Did they shed any light on that for you?

A. Not really.

Q. Miss Erickson, when was the next time you had contact with anybody from the defendant's lawyers?

A. A few days later I think he called me to ask again about his, something that I had said, which was about Mr. Willis doing the test. And he made some comment about that after he got thinking about it, it really was bothering him. And he had checked with one of his associates and thought that was something out of the ordinary that they

probably felt compelled to report to the court.

Q. He was just calling to report that he was concerned about it?

A. He was calling to ask me, just to verify what I had said about it.

Q. All right. And what came about as a result of that phone call?

A. He asked me if I would be willing to sign an affidavit to that fact that it happened.

Q. And what was your answer?

A. I said, yeah.

Q. And when did the, when was the affidavit presented to you for signature, Miss Erickson, if you recall?

A. He faxed me a rough draft that looks like around June

3rd. And I made some changes to it and faxed it back to him.

Q. May I see that which you're referring to?

MR. EYE: Your Honor, may I approach the witness?

THE COURT: Yes.

A. I guess on the 2nd he faxed me one, and I made some changes to it and faxed it back to him. And then he faxed back one that I signed.

Q. May I see this?

A. Sure.

Q. What kind of car do you have, Miss Erickson?

A. A Nissan Maxima.

Q. Did you ever in the process of getting in the car and

going home during court, during the trial of this case ever think about how the seat belt fit you?

MR. ADAMS: Objection, Your Honor. This is outside the scope of the limited area of inquiry that we're--

THE COURT: Sustained.

MR. EYE: Your Honor, I would like to mark this as an exhibit.

THE COURT: All right.

THE WITNESS: Can I have a copy of it back?

THE COURT: Do you want it back?

THE WITNESS: Well, I keep files on everything. I mean, you can make a copy of it, fine. I would kind of like to keep it.

THE COURT: Okay. We'll do that for you. Is that Plaintiffs, Exhibit 1? Plaintiffs' Exhibit 1 is received in evidence.

(Plaintiffs, Exhibit 1 was admitted into evidence.)

MR. EYE: Your Honor, for the record, I'd like to have the witness identify that exhibit.

THE COURT: Okay. My law clerk went to copy it, so as soon as she gets back, we'll get back to it.

MR. EYE: Very well. Thank you.

Q. (By Mr. Eye:) Did you share your notes that you took during the trial with counsel for Ford?

A. I used them when I was just kind of, to refresh my memory when I was going over things with him.

Q. Did you show them to him, show the notes to him?

A. Well, he saw I had them in my hand. He never went

through them, no.

Q. Do you have them today?

A. Yes. Do you want those too?

Q. I'm going to ask you a question. If you need to refer to those notes, you certainly may do so. In your notes, do you make any reference to the statements about an out-of-court fit check that Mr. Willis allegedly made?

A. No. The notes were just during the trial.

Q. Did you make any notes during the deliberative process?

A. No.

MR. EYE: Your Honor, that would conclude my cross-examination, but I would like to reserve just a couple of questions to make --

(There was a malfunction with the court reporter's stenotype machine.)

THE COURT: The record should reflect that Mr. Eye requested and was granted permission to inquire into Plaintiffs' Exhibit 1 and that the exhibit was sent out of the courtroom to be copied and brought back, and then the reporter's machine malfunctioned. Mr. Adams had begun his redirect examination. But Mr. Adams, I'll ask you now to please start over with that redirect examination.

MR. ADAMS: Thank you, Your Honor.

– – – – – –

By Mr. Adams:

Q. Miss Erickson, did you, in fact, ask follow-up questions of Mr. Willis about the test because you were concerned about the effect of that information on the other jurors?

A. Yes, I asked him.

MR. EYE: Objection. Your Honor, that's the same objection I made before.

THE COURT: Okay. The objection is sustained.

Q. Ma'am, with respect to the information that you have regarding this case and the draft affidavits, did I tell you to bring those to court here today?

A. Yes, you did.

Q. And did I also tell you with respect to the affidavit process to make any changes that you felt were necessary to record down as best as possible the whole truth about the deliberations?

A. Yes, you told me to make whatever changes I wanted to.

MR. ADAMS: That's all I have.

THE COURT: Thank you, Miss Erickson. Mr. Eye?

MR. EYE: Thank you, sir.

THE COURT: I think Mr. Adams -- does Mr. Adams have that?

\- - - - - -

RECROSS-EXAMINATION

By Mr. Eye:

Q. Miss Erickson, I'm going to hand you what has been previously marked by the court reporter as Plaintiffs, Exhibit No. 1 and ask for you to identify that document.

A. It's the fax and the copy of the affidavit.

Q. How many pages does that exhibit consist of?

A. Seven.

Q. Is the handwriting on the fourth page of the exhibit yours?

A. Yes.

MR. EYE: Thank you, Your Honor. That would conclude my cross-examination of this witness.

THE COURT: All right. Thank you.

MR. ADAMS: I don't have anything further, Judge.

THE COURT: Do either of you have any objection to Miss Erickson being excused at this time? Mr. Adams?

MR. ADAMS: You know, Your Honor, the only thing that I'm concerned about is that if something comes up in the other examinations of the other witnesses, then I'd like to reserve the right to have other testimony from Miss Erickson.

THE COURT: All right. Miss Erickson, I'll ask you to please remain available in the hall until we finally conclude. And I would like to say if by chance that you don't come back in to testify that we all apologize for

the inconvenience to you. This is necessary for us to go through this process, and we very much appreciate your service and your cooperation with us. Thank you.

THE WITNESS: Thanks.

MR. EYE: Your Honor, one other matter. We would request that the witness be directed not to discuss the testimony she's been giving in this courtroom today.

THE COURT: Certainly. Okay.

THE WITNESS: Would you rather I stay in here?

THE COURT: Do you have any objection to her staying in the courtroom?

MR. EYE: I would prefer that she not be in here during the testimony.

THE COURT: Okay. Pursuant to counsel's request, Miss Erickson, I'll instruct you that you're not to discuss your testimony with anyone else until this hearing is finally concluded. Thank you.

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RONALD LEMMON,

being first duly sworn by the Courtroom Deputy, testified as follows:

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DIRECT EXAMINATION

By Mr. Adams:

Q. Mr. Lemmon, I'm Robert Adams for Ford Motor Company. I believe you know me. Would you please state

your name for the record?

A. Ronald P. Lemmon.

Q. Would you describe to the judge your educational background?

A. Okay. I have graduated from KU with a degree in music education after seven years of college. I started out in engineering for three years, and then I transferred to music ed. Q. Would you please describe to the judge your work history, beginning from college up to the present?

MR. EYE: Your Honor, I'm going to object, this not really having any relevance or bearing on the issues that we're taking up today.

THE COURT: Overruled.

MR. EYE: It's interesting, but it's --

THE COURT: Overruled.

A. Okay. I substitute taught for a couple of years at Shawnee Mission School District, and then I got a job collecting insurance claims. And then I got a job with the city collecting earnings tax, and been with the city for 15 years.

Q. You're currently employed by the City of Kansas City--

A. City of Kansas City, Missouri.

Q. What is your position?

A. I'm a customer service representative.

Q. You were a juror in the case entitled Anderson v. Ford, correct?

A. That's correct.

Q. During deliberations, did a juror state that he

conducted an out-of-court test on a car with a restraint system similar to the car at issue in that lawsuit?

A. Yes, he did.

Q. Who was that juror?

A. Mr. Willis.

Q. I want you to describe in as much detail as possible what you recall about what Mr. Willis said about that out-of-court test.

A. He said he took his son, who I believe was about, I'm not sure of the age, but he was about four feet, eight inches tall, around 86 pounds in weight, took him out to a car dealership, found a car with a configuration of the seat belts that was like the one described in the, about the Anderson accident, and put his son in that seat and put the seat belt on him to see if it fit and how it fit. And he said it looked like it was not fitting well.

Q. Do you recall whether Ms. Erickson or any other jurors asked Mr. Willis questions about that test?

A. Just that Miss Erickson spoke up and said she was kind of surprised that he would do that, he shouldn't have, you know, why would he do that. And she didn't think it was right because the judge had informed us, had told us not to do any kind of field testing sort of thing.

Q. And did Mr. Willis, in fact, admit that he knew he should not have done such a test pursuant to the court's instructions but he was curious as to how the restraint system fit?

MR. EYE: Objection, Your Honor. First of all, it's hearsay, just as a matter of course. But it's also

attempting to have this witness -- it's also leading, and it's attempting to have this witness essentially quote verbatim that which Mr. Willis supposedly said or to have him adopt that which Mr. Adams contends was a verbatim statement.

THE COURT: Objection is sustained as leading.

Q. (By Mr. Adams:) Do you recall any other comments that

were made regarding the test conducted by Mr. Willis?

A. By Mr. Willis?

Q. Yes.

A. I think he prefaced telling us about that with a statement to the effect that he realized he should not have done that, I believe.

Q. He prefaced the statement about the test that he realized he shouldn't have done it because it violated the court's instruction; is that your testimony?

A. Right.

MR. EYE: Objection, leading.

THE COURT: Overruled, but your answer was yes?

A. Yes.

Q. And do you recall that Ms. Erickson asked you whether this matter should be brought to the court's instruction -- strike that.

Do you recall whether Miss Erickson asked you whether, in fact, this test conducted by Mr. Willis should be brought to the court's attention?

A. I recall that Miss Erickson said at some point,

maybe we should go to the judge and tell him that this has occurred, that one of the jurors has done this.

Q. Is there any doubt in your mind that Mr. Willis said that he actually performed this test, as opposed to saying he would merely like to perform such a test?

A. No.

MR. ADAMS: Those are all the questions -- oh, strike that.

Q. Mr. Lemmon, I'm going to show you what has been marked as Defendant's Exhibit No. 2. Is this a copy of the affidavit that you signed in this case?

A. Yes, it is.

MR. ADAMS: And, Your Honor, I would ask that this affidavit which is attached to our motion be made part of the record of this hearing.

MR. EYE: No objection.

THE COURT: Okay. Defendant's Exhibit 2 is received.

(Defendant's Exhibit 2 was admitted into evidence.)

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CROSS-EXAMINATION

By Mr. Eye:

Q. Mr. Lemmon, when did Mr. Willis allegedly make these statements during -- you were in deliberations for a day and a half, give or take?

A. Right.

Q. At what point did he make the statement, allegedly?

A. Well, I couldn't give you exactly, but I believe it was during the first day of deliberations. That would have been Thursday, if I'm not mistaken, that he went there, the weekend previous.

Q. Did he specify the kind of automobile?

A. I don't remember if he did or not. He said the configuration was like the configuration that was involved in the accident.

Q. Did you say anything to any -- strike that. Did you say anything to Mr. Willis as a result of his alleged statement concerning an out-of-court fit check?

A. No.

Q. Did any other juror say anything, other than Ms. Erickson, say something to Mr. Willis directly?

A. I can't recall that.

Q. About how long did the discussion last concerning this alleged out-of-court fit check?

A. Probably as long as it took for Mr. Willis to explain what he had done and to express his opinion of how the seat belt fit his son and for Miss Erickson to say what she did about being, you know, surprised.

Q. A couple of minutes, is that a fair estimate?

A. It would be five to ten minutes, at the most.

Q. Did the topic of the alleged out-of-court fit check come up again during the course of the jury's deliberations?

A. Just when Miss Erickson mentioned later to me that she wondered if we should go to the judge.

Q. Where did that occur, that is, her making this

statement to you about --

A. It was during a time when some of the jurors were out of the room, so we weren't really deliberating. She was just wondering out loud.

Q. What did you say?

A. I said I didn't think it was really worth the trouble.

Q. Do you recall approximately when the conversation between you and Miss Erickson occurred that you just related to us?

A. I believe it was Friday morning.

Q. That would be the second day of deliberations?

A. The second day of deliberations. And probably when we were gathering that morning, so everybody wasn't yet in the jury room.

MR. EYE: Excuse me, Your Honor.

THE COURT: All right.

Q. Mr. Lemmon, when was the first time that you were contacted by any of the lawyers for the defendant in this case?

A. As I recall, it was probably the day after the holiday, Tuesday.

Q. Okay. Memorial Day holiday was Monday, and the following Tuesday?

A. The day following Memorial Day, yes.

Q. Who contacted you, sir?

A. Mr. Adams.

Q. And where was the contact made?

A. It was by telephone at my office.

Q. And what did he say to you and what did you say to

him?

A. He said, he asked me if I would be willing to talk about the case with him. He said if I wasn't willing to talk about it, he would understand. And I said I had no problem. And I gave him some opinions about what I perceived during the trial. And then he asked me specifically, he said that a jurist had told him that Mr. Willis had done this, and he asked me specifically if Mr. Willis had. And I affirmed that he had.

Q. Did you tell Mr. Adams about the conversation, separate conversation that you and Miss Erickson had about the matter

A. I believe so.

Q. Okay. Did you tell him what you said --

A. Well --

Q. -- about raising it with the court?

A. I believe I indicated what I told her. Maybe I didn't say it in those words.

Q. Okay. When was the next time you were contacted by anybody from the defendant's lawyers?

A. Well, at the first contact he asked if I would be willing to sign an affidavit. And then we modified the affidavit that he had until it was satisfactory to me for being what I remembered. So we had a couple of conversations when he faxed an affidavit to me, and then I changed some things, and he faxed another one, and I changed some other things, and we got the final affidavit in form. He came to the office with his secretary to notarize the affidavit.

Q. Do you have the copies of the draft affidavits that

were submitted for your consideration?

A. Actually, I have them at home. I did not bring them with me.

Q. What, if any, changes did you make in those draft affidavits?

A. Just some specifics that I could not remember as being what I remembered.

Q. But in the final analysis, the affidavit that's been identified here as Defendant's Exhibit No. 2 was accurate, as far as your recollection went?

A. That's correct.

Q. Now, Mr. Lemmon, during the time of the attempt to get the affidavit so it was satisfactory to you, did you have any contact with any other jurors?

A. No, I did not.

Q. Did you have any contact with anybody else who represented the defendant?

A. Not during the time -- no, not during the time of getting the affidavit.

Q. Subsequent to that time, have you had any contact with anybody who represents the defendant?

A. Yes. Ms. Long contacted me about the service of the subpoena for this hearing, and she came to the office with that.

Q. Was there any conversation concerning the issues related to the hearing today during that contact with Miss Long?

A. The only thing we discussed about the issues was the fact that a paralegal from your office had called and

questioned me and had started the process of getting another affidavit, which he never followed up on.

Q. When was the next time you had any contact with Ms. Long or anybody else from the defendant's attorney's --

A. I had a call from Miss Long on -- let's see, Monday, I believe. And then a visit from Mr. Adams yesterday at my office.

Q. What happened during the visit with Mr. Adams yesterday?

A. We just discussed what -- basically, went over the affidavit again that I had signed and what I remembered of what happened with Mr. Willis and Miss Erickson.

Q. And you said that you had a contact with Miss Long prior to that?

A. She set up, basically set up an appointment time for Mr. Adams to come over yesterday.

Q. Was there any discussion about the substantive issues that are being taken up in this hearing today?

A. Define substantive.

Q. Did you talk about the alleged juror misconduct? I apologize, I should be more specific.

A. Just how it related to my perceptions about what went on in the jury room at that time.

Q. What did she say to you?

A. Not Miss Long, Mr. Adams yesterday.

Q. What did he say to you in that regard?

A. He just reviewed with me what my, you know, my remembrance was, what I remembered, if I still was in agreement with what I had put in the affidavit, if I still

remembered it as it was, and that sort of thing.

Q. Did you ever see any of the other affidavits filed by any other juror in this case?

A. No, I did not.

Q. Were you ever informed that there were other affidavits filed by, or executed by other jurors?

A. Yes, I was.

Q. And how did you come to be made aware of that?

A. I believe when Mr. Adams first discussed my signing an affidavit, he indicated that Miss Erickson was willing to sign an affidavit at that time too.

Q. Anybody else mentioned, any other jurors mentioned as potential affiants in this case, that is, a person who would
execute an affidavit?

A. Well, yesterday I did ask Mr. Adams who else was going to be here. And since they knew who they were calling, I assumed that those people had also signed affidavits. But it wasn't directly stated that way.

Q. And when you got here this morning, did you discuss the issue of the out-of-court fit check with any of the other
jurors that were assembled?

A. Just whether -- I mean, there was some that maybe didn't recall as well as others. And we were discussing outside whether, you know -- because it was very memorable to me. I stuck in my mind because it seemed so improper. And someone else had said that they vaguely remembered it. In that context, yes.

Q. Was there other discussion concerning the details surrounding this, these statements allegedly made by Mr. Willis during that time?

A. Not really.

Q. Which juror said that it was vague?

A. Miss Smith.

Q. Anybody else?

A. No.

Q. All right, sir.

MR. EYE: Thank you very much, Mr. Lemmon. I appreciate your cooperation. That will conclude my cross-examination.

THE COURT: Thank you. Mr. Adams, do you have anything further?

MR. ADAMS: Just a couple of questions.

REDIRECT EXAMINATION

By Mr. Adams:

Q. Mr. Lemmon, you indicated that you did talk with the plaintiffs' attorney after you signed the affidavit in this case, correct?

A. That's correct.

MR. EYE: Objection. That mischaracterizes his testimony. I believe he spoke with a paralegal or legal assistant in our office.

THE COURT: That's correct.

Q. (By Mr. Adams:) And you stated that you would be

willing to execute any kind of affidavit that stated the truth on behalf of the plaintiffs if they got to the affidavit, correct?

MR. EYE: Objection, Your Honor. First of all, it's leading; and second, that wasn't his testimony.

THE COURT: Sustained.

Q. Did the plaintiffs' attorneys request that you execute an affidavit on their behalf or at their request?

A. The paralegal said that they would like an affidavit from me, yes.

Q. Do you know why they never followed up with you?

A. I have no idea because I never heard back from their office.

MR. ADAMS: Your Honor, those are all the questions that I have, but there is another matter on another point of error that was brought up in my conversation with Mr. Lemmon, and I would like to make a record of that. It's a matter that I think needs to be made a part of the record, and I probably shouldn't talk about it now with Mr. Lemmon in the courtroom.

THE COURT: Okay. Mr. Lemmon, could you just wait outside for us a moment while we talk about this and see if we need further testimony from you? Thank you very much, sir.

(Witness Lemmon left the courtroom.)

THE COURT: All right. Mr. Adams?

MR. ADAMS: Another point of error, Judge, in this case is the fact that the damage figure reached by the jury was basically a quotient verdict. Mr. Lemmon has told

me, and I believe that Miss Rinehart also has testified that essentially what happened in deliberations was that they could not -- well, as far as damage figures, they knew from the deliberations about liability that things were going to be hotly contested, and they decided that what they should do is each juror write down on a piece of paper the amount of damages that they felt should be awarded on that, and they agreed that they would take the average of that figure, and that would be the damages to be assessed in this case. And I believe the court knows that that's improper under Missouri law, and I believe that it's also improper under federal procedure.

THE COURT: But I think it's also improper impeachment of the jury's verdict. Mr. Eye, do you have any--

MR. EYE: I believe it is improper impeachment of the jury's verdict, No. 1. No. 2, the time to raise an error has come and gone in this case and, obviously, the lawyers for the defendant were hot on the jurors' trail soon after this case and they were interviewing them, and certainly the juror that evidently provided this, or the jurors that provided this information to the defendant were the subject of interviews. And my sense is that if they didn't raise it in the time that was necessary to meet the court's order and under the rules of civil procedure, the issue is waived.

THE COURT: Do you want to make an offer of proof on this?

MR. ADAMS: I would, Your Honor.

THE COURT: You may do that. I feel it's

improper impeachment, but you may make an offer of proof, if you like.

MR. ADAMS: Okay. And would you permit me to ask Mr. Lemmon a question about that?

THE COURT: I will.

(Witness Lemmon returned to the courtroom.)

THE COURT: Mr. Lemmon, would you come back up, and I'll remind you that you're still under oath, sir. And your objection to this line of testimony, Mr. Eye, is noted for the record, and it does not have to be repeated, and this is merely an offer of proof on Mr. Adams' part.

MR. EYE: Very well, Your Honor. Thank you.

MR. ADAMS: Thank you, Your Honor.

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EXAMINATION ON OFFER OF PROOF

By Mr. Adams:

Q. Mr. Lemmon, would you please describe to the judge how the jury reached the damage figure in this case?

A. Okay. There was a great deal of disagreement about how much the award should be. And, basically, we decided to speed things up. We would all put a number on a piece of paper, give it to one person, and average it out to an average. We took the average, and we rounded it off to the nearest zero dollar amount, and that was how we came up with it.

MR. ADAMS: That's the only question I

have, Your Honor.

THE COURT: Do you have any questions on this offer of proof?

MR. EYE: One, Your Honor.

THE COURT: All right.

MR. EYE: Well, perhaps it might lead to another, but I do have this.

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CROSS-EXAMINATION ON OFFER OF PROOF

By Mr. Eye:

Q. In the course of discussions about how to arrive at a damage number and the process that you've just described, were you agreeing to be bound by whatever the number was that came up?

A. Well, we were so diverse in our figures that we all agreed to be bound by the number we came up with.

Q. No matter what it was?

A. No matter what it was, we took everybody's figure, added it together, averaged it out, and that was it.

Q. Which juror did the arithmetic?

A. I believe Miss Erickson did the arithmetic.

Q. And did she make known everybody's respective submittals on --

A. Not by name, but she put them all up on -- we had a board. She wrote all the figures up on the board.

Q. When did this occur, Mr. Lemmon?

A. When we were in deliberation, after we had decided

on the verdict.

Q. On the liability, that is --

A. The guilt or the not guilt.

MR. EYE: All right. Thank you, Mr. Lemmon.

THE COURT: Mr. Adams?

MR. ADAMS: I don't have any other questions, Your Honor.

THE COURT: All right. Thank you, Mr. Lemmon. And Mr. Lemmon, would you please remain in the hall for us until we conclude this hearing this morning? And in case you are not recalled as a witness, I'd like to tell you that we all apologize for the inconvenience to you in this process, but we appreciate your service and your cooperation being here today. Thank you.

THE WITNESS: Thank you, Your Honor.

THE COURT: I guess that probably for the record, I should reflect that the offer of proof is denied.

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VONIA SMITH,

being first duly sworn by the Courtroom Deputy, testified as follows:

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DIRECT EXAMINATION

By Mr. Adams:

Q. Would you please state your name for the record?

A. Vonia Smith.

Q. Miss Smith, would you please briefly describe your educational background for the judge?

A. High school, some studies in college, but no credit. I held a real estate license for a long time. Just independent study, mostly.

Q. And where are you currently employed?

A. Distinctive Meetings Travel Agency.

Q. Miss Smith, you were a Juror in the case entitled Anderson v. Ford, correct?

A. Right.

Q. During deliberations, did Dan Willis tell all the jurors that during the trial he examined a Ford Probe similar to the car in the case to check the restraint system?

A. He said he went out to look at one, yes, to check it, yes.

Q. Would you please describe to the judge as best as you can what you recall about the statements made by Mr. Willis concerning that test?

A. He just said he went out to check it and that he took someone with him, I think, to do that. Beyond that, I really can't tell you much about. I don't know what he did. I know he just said that he went out to test it to see what it was like. Q. And it's your testimony that he said that he actually performed the test, as opposed to merely saying, "I would like to do such a test," correct?

MR. EYE: Objection, leading.

THE COURT: Overruled.

Q. Is that correct, ma'am?

A. I believe he said he went out to do it.

Q. I'm going to hand you what has been marked as Defendant's Exhibit No. 3 in this case. And is that a true and accurate copy of the affidavit that you executed in this case? A. Yes.

MR. ADAMS: And Your Honor, I would offer Exhibit 3 to be made part of the record in this hearing.

THE COURT: Any objection, Mr. Eye?

MR. EYE: No, Your Honor.

THE COURT: Defendant's Exhibit 3 is received.

(Defendant's Exhibit 3 was admitted into evidence.)

MR. ADAMS: Those are all the questions I have at this time, Your Honor.

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CROSS-EXAMINATION

By Mr. Eye:

Q. Miss Smith, do you recall approximately during the course of deliberations when these statements were made by Mr. Willis?

A. I don't know. I mean, it was just when we were all sitting in there talking. I couldn't tell you that.

Q. Is it -- do you recall approximately the duration of the discussion about this alleged out-of-court fit check?

A. Very short time.

Q. Was it ever raised again during the course of the discussions with the jury?

A. No.

Q. Or among the jurors?

A. Not that I know of, no.

Q. Was there discussion about whether the fit check that Mr. Willis did had any impact on the fit of the seat belt related to Miss Anderson?

A. I did not discuss anything like that.

Q. Did any of the other jurors?

A. I don't know.

Q. Do you recall any?

A. I do not recall. Okay. I'm sorry.

Q. That's all right.

A. This is very unnerving, no matter what it is.

Q. Miss Smith, when was the first time after the trial that you were contacted by anybody from the defendant's lawyers?

A. I was only contacted by Mr. Adams, office.

Q. Do you recall when that was?

A. When? I was trying to think of that earlier. It wasn't right away. It must have been -- I don't know. I am the worst person when it comes to that. It wasn't immediately after the trial.

Q. Okay. Where were you when he contacted you?

A. At my office.

Q. Did he raise the question with you as to whether Mr. Willis had made these statements concerning an out-of-court fit check?

A. Yes.

Q. What did he say to you about it?

A. He just asked me if he had made statements, that type of a statement and what I remembered about it.

Q. And what did you say?

A. That I recall that he had made the statement that he had gone out to do the check on it and that I thought he had taken someone with him. And that's about the extent of it. I did not get into any further discussion on what he did or how he did it or anything like that.

Q. Did Mr. Adams ask you whether you also during the course of the jury's deliberations discussed this fit check and whether it had any bearing on whether the seat belt, it was actually at issue --

A. I don't believe so.

Q. -- had any impact on your --

A. On my -- it did not have any effect on how I made my decision.

MR. ADAMS: Objection, Your Honor, this is outside the scope.

MR. EYE: Your Honor, that wasn't the question.

Q. The question I want to know whether or not the question came up as to whether the alleged fit check done by Mr. Willis had anything to do with the way the seat belt fit on Miss Anderson.

A. Are you asking me did he ask me that?

Q. Yes.

MR. ADAMS: Objection, Your Honor, vague and ambiguous.

THE COURT: Do you understand the question?

THE WITNESS: I'm not sure if I remember if he asked me that specific question or not.

THE COURT: All right. Thank you.

Q. (By Mr. Eye:) Thank you. But it's your recollection that once the issue of the alleged out-of-court fit check done by Mr. Willis came up and was addressed, it didn't come up again during the course of deliberations?

A. Right. I don't remember us ever talking about it.

Q. On how many occasions since the trial, other than the one that you've just described where Mr. Adams called you, have you been contacted by anybody from the defendant's law firm?

A. I've only been contacted by Mr. Adams and Miss Long.

Q. And when was the contact by Miss Long?

A. She had called something about the subpoena and stuff, I mean, and to tell me that he was going to call. In the same time frame.

Q. Okay. And was that call made? Did you speak to Mr. Adams again?

A. Yes, twice, I think.

Q. And when was that?

A. When he first called to ask me if I had heard this, and

then, I think, yesterday.

Q. All right. And what did he say and what did you say yesterday?

A. Well, just that I needed to be down here this morning and that I would be asked about my statement, and

that's about all.

Q. When you got here today, did you discuss the alleged out-of-court fit check done by Mr. Willis with anybody?

A. You mean the other jurors that were sitting outside this morning?

Q. Yes.

A. Well, we've talked about it in the meantime here while we were sitting out there.

Q. Did you speak with Miss Long about it?

A. This morning?

Q. Yes.

A. Oh, heavens, I don't think so.

Q. Okay. Did you speak with Mr. Adams about it this morning?

A. No.

Q. Okay. To whom did you speak as far as the other jurors about the alleged out-of-court fit check?

A. We were just talking about why we were back down here, that it had to do with that. The other three jurors who are out there right now.

Q. Was there any discussion as to people's various recollections as to what happened in this regard, that I, the statements allegedly made by Mr. Willis concerning the out-of-court fit check?

A. I said I remembered basically what I told you and they, just whatever they remembered.

Q. So they recollected to you what they remembered happening?

A. What they would indicate when they were called about it.

Q. Have you had any contact with any other jurors since the case was concluded last May, other than today?

A. No.

Q. Have you had any contact with anybody representing the defendant, other than its lawyers?

A. No.

MR. EYE: Thank you, Your Honor. That would conclude my cross-examination.

THE COURT: Thank you. Mr. Adams?

MR. ADAMS: I don't have any further questions, Your Honor.

THE COURT: All right. Thank you, Mrs. Smith. And Miss Smith, would you please remain in the hall until we conclude this hearing this morning? And also, in case you are not recalled in the process, I'd like to tell you that we all apologize to you for the inconvenience. You know, I've been called as a witness in a case, too, and it made me nervous, so it's a natural thing.

THE WITNESS: I've been dreading this ever since I knew I was coming down here.

THE COURT: Well, we appreciate your cooperation. Thank you.

MR. ADAMS: We have a witness who went to the restroom, and she'll be back.

THE COURT: All right.

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DEBORAH RINEHART,

being first duly sworn by the Courtroom Deputy, testified as follows:

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DIRECT EXAMINATION

By Mr. Adams:

Q. State your name, please.

A. Deborah Rinehart.

Q. Miss Rinehart, would you tell the judge where you currently work, please?

A. Hallmark Cards.

Q. And what do you do there?

A. I'm a return specialist.

Q. Were you a juror in the case entitled Anderson v. Ford?

A. Yes.

Q. During deliberations, did a juror, Dan Willis, say he went to a Ford dealership to test the restraint system of a vehicle like the Probe at issue?

A. Yes, he did.

Q. And are you sure Mr. Willis said he actually did do the test, as opposed to saying that he would merely like to do such a test?

A. No. I think he did do it.

Q. All right. And, ma'am, you were, after the trial, you were originally first contacted about this case by counsel for the plaintiff; is that correct?

A. Well, you called my work that day or the next day. I didn't talk to you about anything.

Q. All right. You didn't speak to me when I contacted you, correct?

A. Yes.

Q. You were later contacted by counsel for the plaintiff, correct?

A. Yes.

Q. And you spoke with counsel for the plaintiff, correct?

A. Yes.

Q. And I'm going to show you what has been --

MR. EYE: Your Honor, the witness didn't answer the question.

MR. ADAMS: I believe she said yes.

THE COURT: I thought she said yes.

MR. EYE: I'm sorry. I didn't hear it.

THE COURT: But you probably didn't hear it.

MR. EYE: I beg your pardon.

Q. (By Mr. Adams:) What did you speak about with counsel for the plaintiff at that time?

A. He just asked me if Dan had gone to a dealership or had gone somewhere with his son -- that's the part I wasn't clear about, I wasn't clear exactly what was said -- and got in a car and tested the restraint.

Q. Did you execute an affidavit that was typed up by counsel for the plaintiff?

A. Yes.

Q. And would you describe for the judge how you received that affidavit?

A. What do you mean, by the mail or --

Q. Did you make any changes to the original affidavit that you got?

A. No, I don't think so.

Q. I'm going to show you what has been marked as Defendant's Exhibit No. 4. And is that a true and accurate copy of the affidavit that you executed in this case?

A. Yes.

MR. ADAMS: Your Honor, I would ask that Defendant's Exhibit 4 be made part of the record.

THE COURT: Mr. Eye?

MR. EYE: If I could have just a moment to see that, Your Honor, to make sure that we're on the same --

No objection, Your Honor.

THE COURT: Thank you. Defendant's Exhibit 4 is received.

(Defendant's Exhibit 4 was admitted into evidence.)

MR. ADAMS: Your Honor, I don't have any additional questions about the test done by Mr. Willis. I do have an additional offer of proof that I'd like to make on the issue of the quotient verdict.

THE COURT: All right. Do you have any further questions of Miss Rinehart?

MR. EYE: I do, Your Honor. I'd like to take those up before --

THE COURT: All right. Let's do that before

we get into the offer of proof.

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CROSS-EXAMINATION

By Mr. Eye:

Q. Miss Rinehart, did you ask Mr. Willis any questions about the statements that he allegedly made about doing an out-of-court fit check?

A. No.

Q. Did you make any statements to him?

A. No.

Q. Did you ask any questions to any other jurors about this alleged out-of-court fit check?

A. It wasn't when everyone was in there. It was morning, maybe the next day that it happened, Christina and Ron and I were sitting there. And Christina said, "I think he should have excused himself from the jury for saying that." And Ron goes, "Well, maybe he just wanted to make sure that what he was doing, the decision he was making was right is why he did it." And I just said I didn't know. You know, I didn't know if that was doing a history on a case or not.

Q. During the course of that conversation you just referenced, did anybody suggest that this matter should be taken before the court?

A. No, I don't think so. I don't remember anybody saying anything about that. I didn't say anything. I didn't know for sure if what he did was wrong or not.

Q. After Mr. Willis made these alleged statements about the out-of-court fit check, was it brought up again during the course of the jury's deliberations?

A. No, it wasn't.

Q. Do you recall when in the course of the jury's deliberations these alleged statements about the out-of-court fit check were made?

A. No. I would say it was the first day, though.

Q. Do you recall the duration of the conversation that the jury had about this alleged out-of-court fit check?

A. I don't think it was -- he just made the statement that he had done it and it went on from there. I don't think anything more was said about it, actually.

Q. Miss Rinehart, in the course of your conversation with representatives from the defendant's law firm, did they ask you about the affidavit that you executed in this case, which I now marked as Defendant's Exhibit No. 4?

A. What do you mean by that?

Q. Did they ask you any questions about any of the statements that you made in that affidavit?

A. I don't think so.

Q. Well, did they ask you anything at all about the affidavit?

A. Maybe if I had signed one.

Q. And what did you tell them?

A. Yes, I had.

Q. But as far as any discussion concerning the actual statements, you don't recall any occurring?

A. Not really.

Q. All right.

MR. EYE: Thank you very much, Miss Rinehart. That would conclude my cross-examination.

THE COURT: All right. Do you have any further redirect before your offer of proof?

MR. ADAMS: Not on the issue of the test done by Mr. Willis, but yes on the offer of proof.

THE COURT: All right. You may make your offer of proof.

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EXAMINATION ON OFFER OF PROOF

By Mr. Adams:

Q. Miss Rinehart, would you please describe to the judge how the jury reached the damage figure in this case?

MR. EYE: Your Honor, may I have for the record it noted that we also object to this?

THE COURT: Yes.

A. We decided because we were so far off on what everyone thought that we would just put in what we thought the amount should be. And we did, and all divided up, and came up with that amount, because of your lawyer's fees was the biggest thing that was brought up about it.

Q. So the jury decided that they would be bound by the figure that would be arrived at by each person writing down their individual figure, you put it into a hat, and then you got an average, and that was the figure that you ultimately reached, correct?

A. Well --

MR. EYE: Objection, leading.

THE COURT: Overruled.

A. We added up all of the amounts and then divided it, and that's how we came up with that amount.

Q. Those amounts that you're referring to are the amounts that each individual juror wrote down on a piece of paper?

A. Yes.

Q. And then you put the pieces of paper into a hat; is that correct?

A. No, it was the middle of the table and she just -- Christina did it and added it up on a calculator, and that's what we came up with.

Q. And the jury agreed to be bound by that process, correct?

MR. EYE: Objection, leading.

THE COURT: Overruled.

A. Yes, because of the lawyer's fees. That was the biggest question we had.

MR. ADAMS: Thank you, ma'am.

MR. EYE: Your Honor, I'd like the record to reflect that my cross-examination of this witness on this issue is in no way intended to waive objections that we have about the improper, what we consider improper impeachment of the jury's verdict.

THE COURT: The record will so note, and I understand that to be the case.

MR. EYE: Thank you, Your Honor.

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CROSS-EXAMINATION ON OFFER OF PROOF

By Mr. Eye:

Q. Miss Rinehart, in the process of arriving at the verdict, did you consider yourself to have entered into some kind of solemn oath that the number that was arrived at would be the number that you would stick to?

MR. ADAMS: Objection. Vague and ambiguous, Your Honor.

THE COURT: Overruled.

A. No, not really, I guess. You know.

MR. EYE: Thank you, Miss Rinehart. No other questions, Your Honor.

THE COURT: Mr. Adams?

MR. ADAMS: I have no further questions, Your Honor.

THE COURT: Miss Rinehart, thank you very much. I would ask you to please remain in the hall until we conclude this hearing this morning. And in case you're not recalled, I'd like to apologize to you on behalf of all of us for the inconvenience that's been caused to you, but we do appreciate your cooperation. And it was necessary to have you here this morning, and we appreciate the service that you've given throughout the course of this proceeding. So, thank you, Miss Rinehart.

Do you have any other witnesses, Mr. Adams?

MR. ADAMS: No, Your Honor.

THE COURT: All right. Mr. Eye, do you

have any witnesses you'd like to call?

MR. EYE: Yes, sir, we do.

THE COURT: Why don't we take about a ten-minute break before we proceed to do that. Thank you. We'll be done by noon, won't we?

MR. EYE: Yes, sir. I anticipate that we'll be done by noon.

(A recess was taken from 10:35 a.m. to 10:46 a.m.)

MR. EYE: Your Honor, we would call Dan Willis.

THE COURT: All right. Mr. Willis? Would you be sworn by the clerk, please, Mr. Willis?

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DANIEL W. WILLIS,

being first duly sworn by the Courtroom Deputy, testified as follows:

THE COURT: Thank you.

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DIRECT EXAMINATION

By Mr. Eye:

Q. Good morning, Mr. Willis.

A. Good morning.

Q. Please state your name for the record, sir.

A. Daniel Wayne Willis.

Q. Mr. Willis, were you a juror in the case of Anderson against Ford Motor Company?

A. Yes, I was.

Q. Mr. Willis, during the course of the trial -- strike that. During the course of the deliberations that the jury conducted in this case, did you make a statement that you had gone to a Ford dealership and put your son in a car to do a fit check on a seat belt system similar to that which was at issue in the case?

A. No, sir.

Q. Did you state to the jurors that that was something that you, perhaps, would like to do?

A. Absolutely.

Q. Mr. Willis, have you been some period of time without any sleep?

A. Yes, I have.

Q. And why is that?

A. I worked all night. I just got off at 10 o'clock.

Q. All right, sir. Mr. Willis, after the time that you made the statement that you would like to do such a fit check, did the issue of such a, an out-of-court fit check come up again during the course of the jurors, deliberations?

A. No, it did not.

Q. Was there discussion about the way the seat belt fit Rise Anderson?

A. I'm sorry.

Q. During the course of the jury's deliberations, was there discussion about the way the seat belt fit Rise Anderson?

A. When we came up with our verdict or before?

Q. Before.

A. Not really, not that I can remember.

Q. Do you recall whether the seat belt fit was discussed during the course of the jury's deliberations, the seat belt fit as it was on the decedent, Rise Anderson?

A. I really couldn't tell you. I can't remember.

Q. During the course of the trial, did the jury -- I'm sorry. During the course of the jury's deliberations, did anybody speak to you about your statement that you would like to conduct an out-of-court fit check?

A. No.

Q. At the conclusion of the jurors, deliberations, or nearly at the conclusion of the jurors' deliberations, did you arrive at a verdict?

A. Yes, I did.

MR. EYE: Your Honor, in anticipation of making a record on the quotient verdict issue, I would like to inquire of Mr. Willis about the quotient verdict matter. But, again, that should not be construed as a waiver of any objection concerning the issue that has been raised by the defendant.

THE COURT: Well, I'm not sure you can make an offer of proof on something that you're not offering for consideration by the court.

MR. EYE: Your Honor, this is not necessarily an offer of proof. It is in response to the issue that's been raised by the defendant.

THE COURT: Okay. Well, I've overruled all of his offers of proof and stated that the question of the

jury's deliberative process in arriving at the dollar amount is improper impeachment.

MR. EYE: Did you overrule the second offer of proof?

THE COURT: Well, if I didn't, I am now.

MR. EYE: All right. I didn't have it on my notes that that had been done, and that's my mistake.

THE COURT: So the record is clear, the defendant's offers of proof in regard to the issue of a quotient verdict have all been denied.

MR. EYE: All right.

Q. (By Mr. Eye:) Mr. Willis, at the conclusion of the trial, were you contacted by any of the lawyers for the defendant?

A. No -- oh, yes, I was, I'm sorry.

Q. When did that happen?

A. Immediately after the case.

Q. The same day?

A. Yes.

Q. Where did that happen?

A. Just right across the street.

Q. Who contacted you?

A. It was Mr. Adams and, I believe, Mr. Murphy.

Q. Did you speak to them about the case?

A. They asked me some questions.

Q. Do you recall what they asked you?

A. They asked me how we came up with our conclusion and, also, how we came up with the money figure.

Q. Did you ever, did they ask you about any of the alleged out-of-court fit checks that have become the subject of this hearing?

A. No, sir.

Q. Later on, were you contacted by any of the attorneys for the defendant?

A. Yes, I was.

Q. And who contacted you?

A. I don't know her name.

Q. Miss Long?

A. Yes.

Q. And when did that happen, as best you can remember?

A. I'm going to say about a month and a half after the case was over.

Q. And do you recall what she asked you during that contact or what she said to you?

A. Just basically asked me if I did a fit check. And I told her absolutely not. And asked me if it was just a mistake, and I said most certainly.

Q. Were you contacted any other time by any of the lawyers for the defendant?

A. I think Mr. Adams came over one day, but I was in bed and my children didn't wake me up because I work nights.

Q. All right. Do you normally work nights?

A. Oh, yeah, I'm a night stock manager.

Q. And for whom do you work?

A. Barry Road Hy-Vee.

MR. EYE: Thank you, Mr. Willis. That will conclude my direct examination.

THE COURT: Thank you. Mr. Adams?

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CROSS-EXAMINATION

By Mr. Adams:

Q. Mr. Willis, I apologize that you had to be brought here after working a whole shift. As I understand your sworn testimony here today, and also in your affidavit, the only reference that was made in the jury room to any test that was performed out-of-court was a statement by you that you would, quote, like, closed quote, to put your son in a restraint

system to see how it fit him, correct?

A. That's true.

Q. That's the only thing that was said, right?

A. That's it.

Q. You do have a son that was approximately four foot, eight inches tall back in May and June of this year, correct?

A. I think actually he's taller than that, probably.

Q. Well, I'm going to show you what has been marked as Defendant's Exhibit No. 5, and that's an affidavit that you executed on behalf of the plaintiff, correct?

A. Uh-huh, yes, it is.

MR. ADAMS: Your Honer, I would ask that Defendant's Exhibit 5 be admitted into evidence.

MR. EYE: No objection.

THE COURT: Exhibit 5 is received.

(Defendant's Exhibit 5 was admitted into evidence.)

Q. (By Mr. Adams:) And in this affidavit, isn't it true that you state, "My son is approximately four foot, eight inches tall," correct?

A. Yes, that's what I said.

Q. Now, this affidavit was prepared or typed up by counsel for the plaintiff, correct?

A. Yes.

Q. And you testified earlier that you were contacted by me and Mr. Murphy right after the trial?

A. Yes, sir.

Q. And that occurred right on the street as you were leaving the courthouse, correct?

A. Absolutely.

Q. And at that time -- well, strike that. How long did that conversation last?

A. Maybe a couple of minutes.

Q. All right. And did we at all ask you any questions about any checks done by any juror outside the courtroom?

A. No.

Q. Did you say to us that you would like to have performed such a fit check?

A. Did I tell you? No, I did not.

Q. The first time that that issue was raised was when the plaintiffs, attorney contacted you, correct?

A. Yeah.

Q. Who spoke to you?

A. I believe I contacted them after they called me because I was out of town.

Q. Who did you talk with?

A. I believe I talked to Miss Anne Bos and Liz there.

Q. Miss Herbert?

A. Yes.

Q. Did you ever meet with them personally?

A. No, sir.

Q. How many conversations did you have with them over the phone?

A. Just the one, and the one for yesterday telling me I had to be here today.

Q. Describe for the judge as best you can what was said during the original conversation that you had with the plaintiffs, attorneys.

A. They basically asked me the same thing that you all did over the phone. I told them that they asked me if I did a fit check. I said, no, I did not. They asked me what did I actually say? And, of course, I told them I didn't. If I misled somebody, I was absolutely sorry, but that isn't what I said. I said I'd like to.

Q. And the conversation over the phone with the attorneys for the defendant occurred after you talked with the plaintiffs, attorneys, correct?

A. Absolutely.

Q. And when you originally talked with the plaintiffs, attorney, you were told that two of the jurors had executed affidavits that stated that you actually performed a fit check on your son and that you reported those results to the jury,

correct?

A. Excuse me. I'm sorry.

Q. In the conversation that you had with the plaintiffs' attorneys --

A. Uh-huh.

Q. -- you were told that two jurors had executed affidavits swearing that you performed an out-of-court fit check, correct?

A. I don't think so.

Q. All right. I'm going to show you again what has been marked as Defendant's Exhibit No. 5. And this is your sworn affidavit, correct?

A. Yes, it is.

Q. And you make the statement in there, quote, "I have been made aware by one of the counsel for plaintiffs that two of my fellow jurors have stated that I did such a fit check"?

A. Yes, I'm sorry. Yes, that's true.

Q. All right. So you were told in a conversation that two jurors were swearing that you did an out-of-court test, correct?

A. Yes.

Q. And you were also told that that type of test was against the court's instructions, correct?

A. Oh, absolutely.

Q. And you don't recall anyone in the jury room asking you any questions about your statement that you would like to do such a test, correct?

A. Correct.

MR. ADAMS: That's all I have at this time, Your Honor. Thank you, Mr. Willis.

THE COURT: Mr. Eye, anything further?

MR. EYE: Just one question.

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REDIRECT EXAMINATION

By Mr. Eye:

Q. Mr. Willis, after you were made aware that two other jurors had sworn under oath that you had made the statement that you had conducted an out-of-court fit check, you still contended that you had not done that; is that correct?

A. Absolutely.

MR. EYE: All right. Thank you, Your Honor, no other questions.

THE COURT: Mr. Adams?

MR. ADAMS: Nothing further.

THE COURT: Mr. Willis, would you please remain in the hall until we conclude this hearing? And in case you're not recalled, we do apologize for the inconvenience to you, and particularly when you've been up working all night. So thank you for your cooperation.

Mr. Eye, do you have any other witnesses to call?

MR. EYE: No, Your Honor, we do not.

THE COURT: All right. Do you have any other evidence that you'd like to present?

MR. EYE: None that's not already in the record, Your Honor.

THE COURT: Mr. Adams, do you have anything further to present?

MR. ADAMS: No, Your Honor.

THE COURT: All right. Mr. Adams, I'll give you about ten minutes, if you need it, to make any concluding remarks that you'd like to make, and then I'll allow the plaintiffs the same opportunity.

MR. ADAMS: Thank you, Your Honor. Your Honor, I'm not going to in detail summarize the testimony of the witnesses because you just heard the testimony. I will just highlight the various topics that were brought up by some of the witnesses.

There were eight jurors in this case, six actual jurors and two alternates. Today, the defendant, Ford Motor Company, brought in four jurors who all stated that they are positive that Mr. Willis stated that he actually performed an out-of-court test. These jurors also stated that they are certain that questions were asked of Mr. Willis concerning how that test was performed, where it was performed, and who it was performed on. The jurors also testified that Mr. Willis acknowledged that that test violated the court's instructions.

Your Honor, you just heard testimony from Mr. Willis. I would submit to you that that testimony is not credible. It is not believable, given the fact that Mr. Willis swears that the only thing that was said in deliberations was his one statement that I would have liked to have done such

a test. If that was the only statement made, Your Honor, then there would have been no follow-up questions. Miss Erickson testified that she wouldn't have asked him any questions about the details of the test if he merely said, "I would have liked to have performed it."

The evidence indicates that four jurors have testified -- well, strike that. Actually, it was three jurors testified, Mr. Lemmon, Miss Erickson, and, I believe, Miss Rinehart, that the detail was brought up that Mr. Willis's son was four foot, eight inches tall. Mr. Willis said that he never made any statement and that no statement was made, other than the statement that he would like to do such a test.

Again, I think that that testimony establishes that Mr. Willis's entire testimony is not credible. How else would the jurors have known about the size of Mr. Willis's child, unless he was asked questions about the test that he actually performed?

So I think, Judge, the sum total of all the testimony of the witnesses is that there are four witnesses who are absolutely positive, and I believe that their memories show that they are right that an out-of-court test was done.

The issue, then, is the testimony of Mr. Willis and whether that should be believed. Your Honor, Again, I don't -- well, actually, I do mean to imply that Mr. Willis is lying. I do not believe his testimony is credible. You just heard on cross-examination how when he was contacted originally by attorneys for Defendant Ford Motor Company, which was Mr. Murphy and I, we talked to him outside the courtroom, and at that time it was a two-minute

conversation, and we just asked him what happened. He told us briefly --

THE COURT: If Mr. Willis is lying, what's the impact of that, and what do I consider? And do I consider the prejudice that that created? And if so, what's your position on that, and how prejudicial was it?

MR. ADAMS: Your Honor, with respect to the issue of assuming Mr. Willis is lying, I think that the Eighth Circuit does not have a case directly on this issue, and we stated that in our briefs. There's a couple of cases in the Eighth Circuit that deal with actual tests done by the jury in the jury room. I don't think that those cases are very helpful on this point.

The case that I would refer the court to would be the Harold vs. Corwin case that is cited in our brief. And I'll give your law clerk a copy of that case. In that case, Judge, the Eighth Circuit reversed and granted a new trial in a case where a judge read to the jury a definition of a medical term. And in that case, the court did not conduct any type of hearing or inquiry into the effect that that reading of the definition had on the jury. Instead, the court stated -- and this is on Page 1151.

"The transgression here is far more serious and strikes at the root of our whole adversary system; i.e., that trials are to be decided based upon only the evidence and the testimony legally admitted under the guidance and supervision of the court during the course of the trial."

I think that that statement and the analysis done by the Eighth Circuit in the Harold vs. Corwin case indicates

that the Eighth Circuit would automatically grant a new trial if it were ruling on this decision.

Now, the question as to the analysis -- and in our brief we cited some cases where, in other districts where the courts have said that the judge is supposed to sit as a neutral juror and decide whether it's prejudicial. I think it's clearly prejudicial. Even if you look at this issue under that analysis, an out-of-court test done on the most critical issue in this case, which was how the restraint system fit on a person of small stature, is highly prejudicial to Ford Motor Company and was highly prejudicial in this case. In fact, if that type of test was not prejudicial, why, then, did experts from both sides testify about various fit checks that they performed? They did that because that testimony and that evidence was probably the most probative type of evidence on the central issue in the case. So I think even under that analysis it's clear that it was prejudicial and that a new trial was warranted.

Judge, another case that we've cited in our brief is the In Re Beverly Hills Fire case. I'm going to give your clerk a copy of that case because in that case, the Eighth Circuit addressed the issue of out-of-court tests done on an electrical system. And the Court of Appeals, the Sixth Circuit in that case basically did the same type of analysis that the Eighth Circuit did in the Harold vs. Corwin case. And that is that the out-of-court test was basically considered, per se, prejudicial, and the court said that it was an error and that a new trial should be granted.

The standard that the Sixth Circuit said should be

followed in that case is at Page 215. It says, "The jury's receipt of such extraneous information requires that the verdict be set aside, unless entirely devoid of any proven influence or the probability of such influence upon the jury's deliberations or verdict."

That standard is basically, Your Honor, if the court considers that there is any probability that it would have any effect, that then a new trial should be granted, and we've established that. This evidence was on the most critical issue in the case, and it was highly prejudicial.

THE COURT: Can we talk about Dr. Bertelson's testimony for a moment? Do you have anything further you want to say on that?

MR. ADAMS: I've not had the opportunity to even review the transcript.

THE COURT: What about the quotient verdict?

MR. ADAMS: I know the court is well-aware that Missouri case law holds that a quotient verdict is improper. I think the federal courts are in line with that. I think that this is an issue that was properly brought before the court, even in light of Federal Rule of Evidence 606(b), given that we were having an inquiry into the jury's deliberation.

I think that clearly you've heard testimony from two jurors saying that what they agreed to do was to write down, each of them write down an individual number, and then those numbers were averaged up, and that before that process was engaged in, they agreed to be bound by the ultimate number

reached. And that's what, in fact, occurred. So I think that that is another error that was committed by the jury in this case.

THE COURT: All right. Thank you, Mr. Adams. I'll hear from Mr. Eye.

MR. EYE: Thank you, Your Honor. Your Honor, I think it's important that the record be made clear that the testimony from the witnesses today was equivocal on a couple of points, and they're key. It was equivocal as to whether all were positive that Mr. Willis had made the statements. Had two witnesses who said they were positive, the third witness that was presented by the defendant, Miss Rinehart, said he may have done that.

THE COURT: She said that he said that he did do it.

MR. EYE: Well, Your Honor, I believe that she also said that he may have said that. So there's some equivocation.

THE COURT: I mean, you know, I think Mr. Willis did it. I believe the testimony of the four jurors who testified to the effect that Mr. Willis said in deliberations that he performed a fit check, and I don't believe that those jurors have any motivation to tell anything other than the truth in this situation.

And I believe that Mr. Willis is in an unfortunate situation where he does have motivation to not tell the truth. And one thing that concerns me is what effect that has on the jury's verdict, and particularly in regard to Mr. Willis's participating in that verdict in that it has to be unanimous

verdict. And we have someone who I believe did perform an improper fit check, contrary to the jury's, contrary to the court's instructions to the Jury on that subject. And that's really, you know, what I think we ought to be talking about, given my judgment of the credibility of the witnesses that I've heard from.

MR. EYE: Given the court's finding of fact in that regard -- I suppose that that's an accurate characterization of your conclusion, that it is a finding of fact?

THE COURT: Yes.

MR. EYE: All right. Given that it is a finding of fact that the out-of-court fit check was conducted, we would contend that the nature and extent of any prejudice emanating from that is such that even under the case law quoted, cited by the defendant, it is not proper to vitiate the jury's verdict. The case law cited by the defendant indicates that there has to be some probable influence on the outcome of the case. These jurors testified, the jurors presented by defendant, that what happened was that the issue about an out-of-court fit check was raised and they went on and focused on that which was more important to them, and that is how did the seat belt fit the decedent, not how it fit anybody else, but how it fit the decedent. There was nothing said or done, according to the testimony that was presented here, that would have anything to do with how the seat belt fit anybody but the decedent. Once the alleged statements made by Mr. Willis were made, they went on. And I think it's significant to note that the same

jurors that were brought in here took this up essentially as a matter outside the presence of other jurors, or at least Ms. Erickson, Mr. Lemmon, and Miss Rinehart. And at least Mr. Lemmon and Miss Erickson determined that it wasn't worth bringing to your attention. Now, that has to have some bearing. That should indicate some -- to the extent that it had any prejudicial effect on their verdict, it simply did not. And it's not that any misconduct can cause a jury's verdict to be reversed, it has to be material, it has to be prejudicial.

It's like saying that every court, every jury trial has to be perfect. We know that that's not the case. It has to be fair. Was the outcome fair. These jurors were polled at the end of their deliberations, and they were asked individually, "Is this your verdict?" And they each answered in the affirmative.

THE COURT: Well, see, my real concern is how it impacts on Mr. Willis's participation in the verdict. I don't know that I feel that the other jurors were necessarily prejudiced by Mr. Willis's statement that he had performed this fit check, but it seems to me that he probably was. He probably was prejudiced by virtue of the fact that he performed this fit check and that he determined that the seat belts did not fit, properly fit a person of small stature based upon his out-of-court experiment in that regard. And he was one of the jurors that voted unanimously on the verdict. Do you understand what --

MR. EYE: I understand that we're focusing on him.

THE COURT: Not worried about the other jurors, but we're focusing on Mr. Willis, that we have someone who went out and did this test and made a determination based upon information that he had gathered extraneous to the trial proceeding.

MR. EYE: But the leap there is that it actually did prejudice the verdict that he rendered, and there's no indication that that happened.

THE COURT: Well, yeah, I guess that's a judgment that I have to determine, you know, whether it's reasonable to determine that that did prejudice him.

MR. EYE: Correct. And in light of the extensive evidence put on by both sides, that has to be considered, as well, it seems to me, in determining whether or not it had a prejudicial effect on his deliberations, on his ultimate conclusion here. As you recall, we discussed fit check ad nauseam in this case. And I don't think it's insignificant that it's being raised again here today.

THE COURT: I do recall that, Mr. Eye.

MR. EYE: The case that I believe was being discussed toward the end of Mr. Adams, argument, the In Re Beverly Hills, and it really segues and meshes nicely with the Harold case out of the Eighth Circuit, does talk about the extent of influence, whether there was any influence that can be shown to be prejudicial.

And we would argue that in this case, the record is devoid of any showing of influence, particularly when it's measured against the extent of the evidence that was presented by both sides on the fit check. And in that regard,

what's absent here is actual evidence of prejudice.

And I'm not suggesting that the court can't draw inferences from the evidence that's there, but to do so and to reverse a jury verdict, I would suggest, requires something more than an inference. And now we're talking about the testing, the fit checks that were done and were testified about in the courtroom essentially becoming secondary to that which may have been raised in a very fleeting way in the jury room.

Did it have an impact on Mr. Willis's deliberations? We don't know. We don't know. And as I understand the case law in this, under 606(b), I'm not even sure it's proper to get into that substantive issue with a particular juror.

THE COURT: I don't believe that it is.

MR. EYE: May I have a moment, Your Honor?

THE COURT: Yes.

MR. EYE: Your Honor, given the ubiquitous nature of seat belts in the automotive culture that we're in, it seems entirely likely that each day when the jury parted the courthouse and got in their automobiles and dutifully obeyed Missouri law and put their seat belts on, they were in their own way conducting an informal check to see how that thing laid across their body. If Mr. Willis took it upon himself to conduct a fit check as has been testified to here by the jurors this morning, it didn't contradict the testimony and evidence that was otherwise being presented.

The Harold case talks about a misleading definition out of a medical dictionary. The fit check, if done by Mr. Willis, was not misleading inasmuch as it actually was

something that was being done every day by jurors as they got in their cars and got out of their cars or drove their cars, nor did it necessarily contradict that which was going on from the witness stand. And the language in, it's either the Beverly Hills case or the Harold case, and there may actually be language in both, really goes to this point of -- it's a fine point as to whether this was something that was actually contradictory to that which was otherwise being presented during the course of trial. And that's not what was going on here.

And, again, the actual prejudice that has been, or the argument that there was actual prejudice is really not supported by any evidence of it. Even the jurors that the defendant called didn't indicate that there was any discussion about this once it was raised, and they went on. We don't know what the influence was on Mr. Willis. But on the other hand, under the Harold and In Re Beverly Hills case, there has to be some indication that that which was done was prejudicial, there's evidence of prejudice, and that that which was done was somehow contradictory to that evidence that was being elicited by the parties from the witness stand, and neither of those predicates have been met in this instance.

So we would conclude by simply saying that the likelihood of a different outcome based upon the statement that Mr. Willis made seems to be not only unlikely and improbable, but, again, based upon the testimony from Miss Erickson, Miss Rinehart, and Mr. Lemmon, indicates that it was of no consequence to them, what Mr. Willis said. And

then we go to focus on Mr. Willis, and we don't know whether it had any impact on him. So as a practical matter, the witnesses they presented didn't have any great impact. As a legal matter, we don't know whether it influenced Mr. Willis at all, and the record is devoid in that regard.

THE COURT: All right. Thank you, Mr. Eye. Mr. Adams, I've give you five minutes to respond, and then we'll set a briefing schedule, and I'll give you the parameters of what I would like for you to brief additionally.

MR. ADAMS: Judge, two points. The first point on the issue of prejudice, I think clearly it was prejudicial. Miss Erickson, the first woman who testified, said that she believed that it was important to Willis; otherwise, he wouldn't have done the test. And that also it was important to the others. She was very concerned about the test. It was not just spoken about on one occasion. You heard testimony from Miss Rinehart and Mr. Lemmon that Miss Erickson even considered bringing up the matter to the court and, unfortunately, that was not done.

On the issue of the fact that that test could not be prejudicial, I think it strains credibility and reality to think that an out-of-court test done by a juror using a person with small stature would not be prejudicial in this case. I am sure that, as Mr. Eye stated, that the jurors probably did travel back and forth in cars where they had seat belts, but those jurors were not violating in any way your instruction which is modeled after the Eighth Circuit instructions that they're not supposed to do any type of out-of-court testing.

They did not take somebody of small size, four foot, eight inches, and put them in a car -- and not just any car, a Ford Probe with the somewhat unusual seat belt system in that it was a passive restraint system which was made only in a certain time period, not a three-point belt system which most of the jurors probably had, and they didn't do that type of a test.

So I think on the issue of prejudice, it is clear that that type of test was prejudicial. The fact that a couple of the jurors said that it may not have had any effect is really not the test and it shouldn't be considered under Rule 606.

The second point is that really the, regardless of what the jurors say about whether that had an effect on them, it's clear there's another factor that I think the court has to uphold here, regardless of any perceived prejudice, and that's the fact that our, under our adversary system, trials are supposed to be based upon evidence admitted through you at trial. It's not supposed to be based upon any type of out-of-court test done by the jurors.

Your Honor, I have scorched the legal earth on this issue. I have not found one single case where a judge who has made a finding of fact that a juror did an out-of-court test on a critical issue in a case then went ahead and affirmed the verdict of the jury. All of the cases that I have found on any out-of-court tests are reversals. And I will submit that there are not a lot of those cases, but we have done our best to put them in our brief.

And just in summary, Judge, I think my second point is really probably more important. And that is that

under our adversary system, people are supposed to get a fair trial based upon the evidence admitted in court, and it's all of our jobs to make sure that that happens. That didn't happen in this case, and Ford deserves a new trial because of it.

THE COURT: All right. Thank you, gentlemen.

Mr. Adams, can you give me any additional briefing that you would like to in regard to the question of Dr. Bertelson's testimony by Wednesday of next week?

MR. ADAMS: Yes, Your Honor.

THE COURT: And Mr. Eye, can you respond to that by Wednesday of the following week?

MR. EYE: I believe so, Your Honor.

THE COURT: Okay. Do you need to check your calendar?

MR. EYE: I was trying to think if I've got anything --

THE COURT: That really gives you two weeks to work on it.

MR. EYE: I think that's adequate, Your Honor.

THE COURT: All right. And then, Mr. Adams, you can reply by Monday of the week after that, if you wish to do so. And I'm only asking for additional briefing in regard to the question of Dr. Bertelson's testimony. If any of you wish to supplement your brief in regard to the juror misconduct question, you can do that, but I'll limit you to not more than five pages on that question. And I don't believe that the issue of a quotient verdict is

before me, and so I am not asking for any additional briefing on that question. I suppose that if somebody finds a case that they think is just absolutely on point and imperative for me to review that I would allow you to address that question in not more than two pages.

Am I entering any kind of a time problem in regard to ruling the Motion for New Trial?

MR. ADAMS: I don't believe you are, Judge. I think under the old rules you would have been and under Missouri law you would be, but I don't believe under federal procedure you are. But I'll look at it again.

THE COURT: If any of you discover that there is any kind of a time problem, if you could bring it to my attention and we'll have a telephone conference or whatever we need to do to address that.

MR. ADAMS: Judge, on Dr. Bertelson's testimony, I haven't had a chance to review it. And what I would request is that I could take that back to my office and copy it, and actually I can make two copies. I can Fed-Ex one to the plaintiffs, and I could get the other one delivered back to the court. I don't really care, but I would like to get a copy of that testimony.

THE COURT: Do you have any objection to my allowing Mr. Adams to take that exhibit?

MR. IRIGONEGARAY: I'll take it with me and send him a fax copy.

THE COURT: And me also?

MR. IRIGONEGARAY: Of course. I'll send you the original.

MR. ADAMS: I don't care.

MR. IRIGONEGARAY: I just wanted to read it, and I haven't had a chance to go in depth here in the courtroom.

THE COURT: Will you copy that today and Fed Ex a copy to Mr. Adams so that he receives it tomorrow?

MR. IRIGONEGARAY: It shall be done.

THE COURT: All right. Thank you, gentlemen. And ladies.

MR. ADAMS: Judge, is there any type of page limit overall on the Bertelson issue?

THE COURT: No, just under the normal rules. Thank you all. Would you all like to withdraw your exhibits? I already have those in the record anyway.

(Hearing adjourned at 11:30 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

December /s/ 18, 1998

/s/Kathleen M. Wirt
Kathleen M. Wirt, FCRR, RMR
U.S. Court Reporter

APPENDIX D

TRANSCRIPT ON APPEAL
PRETRIAL CONFERENCE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

R. R. AND BARBARA ANDERSON, Heirs-at-law of Decedent, Rise' R. Anderson, Plaintiffs,	)
vs.	) No. 95-0750-CV-W-1
FORD MOTOR COMPANY, Defendant.	)Friday, September 11,)1998)Kansas City, Missouri

TRANSCRIPT ON APPEAL
BEFORE THE HONORABLE GARY A. FENNER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings reported by computer stenography; transcript produced by computer.

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But the only demand we ever got was 3.5 million and there was no response to our offer of judgment. So you know that doesn't leave us any course.

MR. IRIGONEGARAY: Well, the response to our offer of 3.5 million was the $50,000 offer of judgment. So it's not like Ford was attempting to negotiate in good faith. I just don't think that it's going to settle. I think we need to plan on the trial and see what happens.

THE COURT: I mean, obviously, Ford has got some exposure in this case and we saw that last time.

And quite frankly, I think that even without the juror going out and doing the seat belt test, that jury was inclined to find in plaintiffs, favor and that can happen again. I mean I think that and I don't mean this as any kind of criticism of your position on it either, Rob, but you know it's worth a lot more than $50,000 to Ford to get out of this case.

And, you know, probably the verdict that they got last time is at the high end of the spectrum on things. And, you know, but the case, it's worth several hundred thousand dollars in my estimation, easily. If you all would like to have me refer this to a magistrate to try and mediate some discussion with you all on it, I'd be more than happy to do that.

Now, I don't want to waste any more of your time but I mean if you don't think Ford is willing to pay, you know, some significant sum; and if you all don't think that, you know, something less than what you got last time is going to satisfy you, then there's no use in doing it.

MR. ADAMS: Judge, and I was told by Bob and, Bob, you can correct me if I'm wrong, that something less than what they got last time would not be sufficient. And so, you know, it doesn't give us any course if that's their position. I don't think mediation would be --

MR. IRIGONEGARAY: I agree with you, Rob. Judge, I don't think it would. There is so much invested. It's a very significant amount invested in this case.

THE COURT: Well, I know that. I know you all have worked very hard in the case and you do have a lot in it. And it's a very expert intense situation. And it's

been very expensive for everybody to go through this litigation. I don't know, I mean I think that, my feeling from Rob is, you know, just from this conversation that they're willing to pay a lot more than $50,000. But, you know, if you all need three quarters of a million dollars to settle the case, you know, I'm pretty confident that, you know, that isn't going to happen.

MR. EYE: The only offer we've ever seen was $50,000 transmitted to our client. The client said no. And it was, the $50,000 was sufficiently low that it sort of

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Supreme Court, U.S.
FILED
JAN 4 2000
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No. 99-95

In The

Supreme Court of the United States

R.R. AND BARBARA ANDERSON,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant a petition for certiorari to review the Eighth Circuit's use of the abuse of discretion standard, rather than the inapplicable plain error standard urged by the Petitioners, in reviewing the District Court's grant of new trial where a juror conducted an improper out-of-court experiment and then lied to the District Court about it.

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6

Respondent Ford Motor Company has no parent corporation and no other corporation has a financial interest in this matter. The following is a list of domestic and foreign companies in which Ford Motor Company owns an equity interest of at least 10% but less than 100%.

United States – The Hertz Corporation

Consumers Car Club

Collision Team of America, Inc.

Ecostar Electric Drive Systems, L.L.C.

FRN of San Diego, LLC

FRN of Tulsa, LLC

Argentina – Invercred Compania Financiera S.A.

Australia – Ford Motor Company of Australia Limited

Belgium – Ford Motor Company (Belgium) N.V.

Brazil – Autolatina Comercio e Participacoes Financerias Ltd.

Denmark – Ford Motor Company A/S

Finland – Oy Ford Ab

Germany – Ford Werke-Aktiengesellschaft

Holland – Ford Nederland B.V.

Japan – Mazda Motors Corporation

Korea – Ford Motor Company of Korea

LISTING OF PARENT COMPANIES AND SUBSIDIARIES PURSUANT TO RULE 29.6 – Continued

Norway – Ford Motor Norge A.S.

Pivco Industries AS

New Zealand – Ford Motor Company of New Zealand Limited

Singapore – Ford Motor Company Private Limited

Switzerland – Ford Motor Company (Switzerland) S.A.

Vietnam – Ford Vietnam Limited

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ford Motor Company ("Ford") respectfully requests this Court deny the Petition for a Writ of Ceriorari seeking review of the United States Court of Appeals for the Eighth Circuit's affirmation the District Court for the Western District of Missouri's grant of new trial.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE EIGHTH CIRCUIT APPLIED THE APPROPRIATE STANDARD OF REVIEW IN DETERMINING THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THE OUT-OF-COURT TEST CONDUCTED BY A JUROR PREJUDICED FORD

Petitioners argue the Eighth Circuit's opinion departed from the standard set forth in *U.S. v. Olano*, 507 U.S. 725, 739, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). Petitioners' reliance on *Olano* is misplaced. *Olano* does not address the proper standard for determining whether a juror's misconduct warrants a new trial. Rather, *Olano* addresses the power of a court of appeals under Federal Rule of Criminal Procedure 52(b) to correct an error of the district court.

In *Olano*, the Supreme Court reviewed the Ninth Circuit's reversal of the convictions of the respondents based upon the fact that the district court, without objection of the parties, allowed alternate jurors to be present during jury deliberations in violation of Federal Rule of Criminal Procedure 24(c). *Id.* at 729. Rule 24(c) requires

alternate jurors be discharged prior to deliberations. *Id.* The Ninth Circuit had held the presence of the alternate jurors was reversible per se under the "plain error" standard of Rule 52(b). *Id.* The Supreme Court noted no hearing had been conducted pursuant to Federal Rule of Evidence 606(b) to determine whether the alternate jurors participated in deliberations or influenced the verdict and, accordingly, the record was devoid of evidence of prejudice to the respondents. *Id.* The Supreme Court held the presence of the alternate jurors was not an error the Ninth Circuit was authorized to correct under Rule 52(b) because the error did not affect the respondents' substantial rights. *Id.* at 740.

Contrary to the Petitioners' claim, the appropriate standard for determining whether juror exposure to extraneous material warrants a new trial is set forth in *Banghart v. Origoverken*, 49 F.3d 1302, 1306 (8th Cir. 1995):

> In a civil case the exposure of jurors to extraneous material not admitted into evidence mandates a new trial *when it is established that the materials are prejudicial* to the unsuccessful party. *Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 (8th Cir. 1995).

The appropriate method for the District Court to determine whether an extraneous juror experiment is prejudicial is by considering whether "there is a reasonable possibility that the communication altered [the jury's] verdict." (citing *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992)).

The Eighth Circuit appropriately determined that the District Court, after conducting a hearing pursuant to Federal Rule of Evidence 606(b), concluded that a juror

had taken his son, who is 4' 8" tall, to a Ford dealership and conducted a fit test of the restraint system of a Ford Probe. As the Eighth Circuit noted, the District Court found the out-of-court test prejudiced Ford based upon the following findings: (1) the out-of-court test involved a controlling issue of whether the restraint system of the 1991 Probe was designed to fit small persons so that they would be protected in a collision; (2) the out-of-court test was a significant matter considered by Willis in joining the verdict; (3) Willis conducted the out-of-court test with knowledge that he was violating the District Court's instructions; (4) Willis was not truthful with the District Court at the hearing regarding the out-of-court test he conducted; and (5) Willis was prejudiced against Ford. (Petitioners' Apdx. A, pp. 8-9). The Eighth Circuit determined these conclusions were properly within the province of the District Court and supported the finding of prejudice to Ford. (Petitioners' Apdx. A, p. 9).

Likewise without merit is Petitioners' argument that the transcript of September 11, 1998, pre-trial conference for the second trial shows the District Court did not believe the out-of-court test prejudiced Ford. Specifically, Petitioners cite to a portion of the transcript where the District Court, in an attempt to encourage settlement of the case before the second trial, stated:

> I think I know you all well enough that it probably is a waste of time to ask if there is any possibility of this case being settled at this point. I suppose we probably wouldn't be here if it was and everybody has got an awful lot in this. And I imagine that would present some difficulty to you. But what's your position on any effort to settle, Pedro? [Plaintiffs' counsel]

. . . .

> I mean, obviously, Ford has got some exposure in this case and we saw that last time. And quite frankly, I think that even without the juror going out and doing the seat belt test, that jury was inclined to find in plaintiffs' favor and that can happen again. I mean I think that and I don't mean this as any kind of criticism of your position on it either, Rob [Ford's counsel], but you know it's worth a lot more than $50,000 to Ford to get out of this case.
>
> And, you know, probably the verdict that they got last time is at the high end of the spectrum on things. And, you know, but the case, it's worth several hundred thousand dollars in my estimation, easily. If you all would like to have me refer this to a magistrate to try and mediate some discussion with you all on it, I'd be more than happy to do that.

(Petitioners' Apdx. D, p. 101).

Petitioners' attempt to dispute or taint the findings made by the District Court in the New Trial Order is improper. The District Court specifically granted Ford's motion for new trial on the grounds that the juror's out-of-court test prejudiced Ford. The statements later made by the District Court at the pre-trial conference to encourage settlement cannot be used to show the District Court did not believe the juror misconduct was prejudicial to Ford. *See Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 43 (4th Cir. 1984) ("[c]ourts must speak by orders and judgments, not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or

after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, the judgment must govern."); *Segars v. Atlantic Coast Line Railroad Co.*, 286 F.2d 767, 770 (4th Cir. 1960) ("It is the formal order that determines the action of the court rather than some chance statement or observation made by the Judge during the course of oral argument."). Further, the statements made by the District Court at the pre-trial conference were in the context of encouraging settlement by saying, in effect, that neither party could be assured of getting the result they wanted out of the second trial and cannot be construed as amending the New Trial Order.

The Eighth Circuit's holding is in accord with its precedent as well as precedent from the other circuits.

CONCLUSION

The lower courts properly applied the correct standard in determining the juror's out-of-court experiment was prejudicial to Ford. Accordingly, consideration by this Court is not warranted.

Respectfully submitted,

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No. 99-951

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In The

Supreme Court of The United States

October Term 1999

R. R. AND BARBARA ANDERSON
Petitioner,

v.

FORD MOTOR COMPANY
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

REPLY TO THE BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONERS

I. THE *OLANO* HOLDING EXTENDS TO QUESTIONS OF JUROR MISCONDUCT GENERALLY, NOT MERELY THOSE STEMMING FROM THE PROVISIONS OF FEDERAL RULE OF CRIMINAL PROCEDURE 52(b).

The respondent suggests an unjustifiably narrow reading of *U.S. v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed 2d 508 (1993) to encompass only its precendential value in the context of Fed.R. Crim.Proc. 52(b). Respondent's position overlooks the plain language of *Olano* regarding a necessity that post-trial relief be predicated on a showing that the verdict was altered due to prejudicial conduct. 507 U.S. at 739.

The logic of *Olano* recognizes that the potential for prejudice stemming from juror misconduct certainly exists. However, *Olano* also recognizes that not every instance of misconduct is *a priori* prejudicial. This "no harm, no foul" analysis was the law in the Eighth Circuit prior to the instant case. *See Banghart v. Origoverken, A.B.*, 49 F.3d 1302, 1306 (8th Cir. 1995). Now, the Eighth Circuit has adopted the "reasonable possibility" standard from *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1142 (7th Cir. 1992).

Respondent's position is contrary to a long line of precedent which has stood the test of time. For example, in *Kilgore v. Greyhound Corp.*, 30 F.R.D. 385 (E.D. Tenn. 1962), a juror's out-of-court test precipitated his unsuccessful attempt to sway other jurors. *Id.* at 382. His attempt was futile because the other jurors "would have been naive indeed to have accepted as 'expert testimony' [the juror's] conclusions from his experiences outside of court." *Id.*, at 387.

The instant case, like *Kilgore*, lacks any indication that juror Willis's out-of-court experiences altered the verdict. Unlike *Kilgore*, there is no indication that Mr. Willis even made any attempt to sway other jurors.

If the Eighth Circuit decision herein stands, a "hair trigger" standard for post-trial relief will be established. This precedent will require only a showing that a juror violated an instruction to justify a new trial. No showing of an impact on the verdict is now required in the Eighth Circuit. When all that is required is that there be a reasonable possibility that the extraneous communication altered the verdict, it follows that the number of new trials will increase for no good reason. The *Olano* standard means much more than an interpretation of F.R.Crim.Proc. 52(b); it protects jury verdicts from unwarranted post-trial relief.

II. THE DISTRICT COURT'S POST-TRIAL COMMENTS CONCERNING THE VERDICT ILLUSTRATE THAT THE VERDICT WAS NOT ALTERED DUE TO THE JUROR'S OUT-OF-COURT TEST.

The petitioners' inclusion of the district court's statement indicating that even without the out-of-court test, the "jury was inclined to find in plaintiffs' favor" is not an attempt to dispute or taint the findings in the new trial order. Rather, it is included in petitioners' brief to illustrate the consequences of setting a significantly lower threshold for post-trial relief. The Eighth Circuit's opinion allowed the district court to grant relief, not because the out-of-court test caused the eventual verdict, but simply because it was done in violation of the court's instructions. 186 F.3d at 921.

On a question of the prejudicial impact of juror misconduct, the subject comment by the district court is germane to the issue of whether the out-of-court test altered the verdict.

III. CONCLUSION

This Court should grant this petition to re-establish the proper standards for post-trial relief in the context of juror misconduct.

Respectfully submitted,

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